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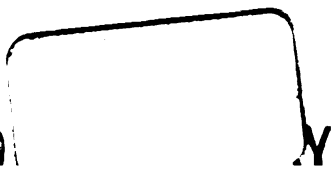
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Massachusetts. Attorney General's Office.

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CITED, AND AN INDEX DIGEST.

REPLIX

PREFACE.

The present volume is issued by the Attorney-General in pursuance of the authority contained in Resolves of 1906, chapter 18, which provides that the Attorney-General shall "collect and publish in a volume properly indexed and digested such of the official opinions heretofore published as an appendix to the annual reports of the attorney-general during the years eighteen hundred and ninety-nine to nineteen hundred and five, inclusive, as he may deem to be of public interest or useful for reference."

It has seemed best that the method of arrangement of this volume should follow that of Volume I of the Opinions of the Attorneys-General, issued in 1899, so that there should be a substantial uniformity in the several volumes of the series. The work of preparation has been in charge of Frederic B. Greenhalge, Assistant Attorney-General.

DANA MALONE,
Attorney-General.

Boston, December, 1907.

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OPINIONS

OF

HOSEA M. KNOWLTON, ATTORNEY-GENERAL.

PAUPER—DEAD BODY—PROMOTION OF ANATOMICAL SCIENCE.

By St. 1898, c. 479, an act relative to the promotion of anatomical science, the officials named therein must surrender to medical schools, upon proper application and the giving of a bond as prescribed, such bodies as would otherwise be buried at the public expense.

After such application, the officials cannot bury the body at the public expense. The terms of the bond, as required by the statute, prohibit the return of such bodies.

Your letter of November 16, 1898, submits certain questions touching the construction of St. 1898, c. 479, entitled "An Act relative to the promotion of anatomical science."

To the Superintendent of the State Farm.
1899
January 9.

The statute in question is mandatory. It is in substitution of Pub. Sts., c. 81, which was merely a permissive act. Under the Public Statutes, the overseers of the poor and other officials named in the act might, in their discretion, deliver bodies which otherwise must be buried at the public expense, for the purpose of dissection, but they were not compelled so to do. Under the statute of 1898, however, upon the application of the dean or other officer of a medical school established by law in this Commonwealth, such officers are required to surrender the bodies which otherwise would have been buried at the public expense, for the use of such schools, upon the giving of a bond as prescribed in the statute. Such application having been made, the overseers of the poor and other officials enumerated have no right to bury the body at the public expense or to use the public funds for that purpose, but must, upon the receipt of a sufficient bond, deliver the body upon the application.

Your letter also inquires whether it is lawful to insist, as one of the conditions, that the body, after being used by the medical school, should be returned to those from whom it was received. The penal condition in the bond distinctly provides, following § 2 of the act in question, that the body must be kept for fourteen days, for purposes of identification, and that, after having been used for the promotion of anatomical science, "the remains shall be decently buried." This requirement, which is one of the conditions of the bond to be given, prohibits the return of the body.

I enclose a form of bond which I have had printed for use of institutions included in the provisions of the act. It is not for this office to fix the amount of the bond, but I see no reason why a penalty of one hundred dollars for each body, which, I understand, has been the usual sum in such cases, is not sufficient.

INSURANCE — AGENT — LICENSE — POWER OF ATTORNEY.

The authority of a person duly appointed by an insurance company, and licensed by the insurance department of the Commonwealth, as an insurance agent, is ordinarily personal in its nature, and cannot be transmitted to another. The question whether the authorized agent of an insurance company can delegate to another the power of countersigning a policy, is one which does not concern the insurance department of the Commonwealth.

To the
Insurance
Commissioner.
1899
January 10.

Your letter of December 16, 1898, requests the opinion of the Attorney-General upon the following question: "Can the authority of a person duly appointed by an insurance company, and licensed by this department as an insurance agent, be delegated to another by power of attorney?"

It is impossible to answer your question generally. I can conceive of cases where the agent might act by attorney, clerk or sub-agent. Ordinarily, however, such an appointment is personal in its nature, and cannot be transmitted to another.

The specific question in your letter, intended to illustrate your general question, to wit, whether an authorized agent can delegate to another the power of countersigning a policy, is one that does not concern your office. Whether the policy is duly issued is a question for the parties, not for you.

COUNTY ACCOUNTS — LAW LIBRARY ASSOCIATION — TITLE TO MONEY FROM COUNTY TREASURY.

The Norfolk Bar Association was organized in January, 1898, and was entitled to receive the full amount appropriated under Pub. Sts., c. 40, § 6, as amended by St. 1882, c. 246, on the first day of January, 1899, although its by-laws were not approved by the Superior Court until November, 1898.

Pub. Sts., c. 40, § 6, provides that "County treasurers shall annually pay to the law library associations in their respective counties all sums paid into the county treasuries during the year by the clerks of the courts, to an amount not exceeding fifteen hundred dollars in any one year." St. 1882, c. 246, made the amount two thousand dollars, instead of fifteen hundred dollars. I am informed that this statute is so construed as to make the amount so appropriated payable on the first day of January.

To the
Controller
of County
Accounts.
1899
January 10.

The Norfolk Bar Association was organized in January, 1898, but its by-laws were not approved by the Superior Court until November. It was, however, in existence, and entitled to the provisions of law made for its benefit, in January, 1899, and is entitled to the amount appropriated under the section quoted.

The fact that it has not been in existence during the entire year is not, in my judgment, of consequence; nor the fact that the county commissioners have, under appropriations therefor, purchased books during the year for the law library. The full amount provided by the statutes is nevertheless payable to the association.

PAUPER — MARRIED WOMAN — SETTLEMENT.

A woman who acquired a settlement by marriage in one town could not acquire one on her own account, under St. 1879, c. 242, § 2, in another, so that she could become a charge upon the second town, after her husband's settlement and her own, acquired by marriage, in the first town, were destroyed by St. 1898, c. 425, § 2.

The case stated in your letters of October 1, 1898, and January 9, 1899, is this: A man, born in Massachusetts, had a settlement in Leominster, acquired prior to 1860. This settlement was lost by the provisions of St. 1898, c. 425, § 2. His wife

To the Super-
intendent of
State Adult
Poor.
1899
January 10.

had acquired settlement in the same place by her marriage. Her settlement also was lost by the same statute. From 1874 to 1882, while married, she resided in Athol, without receiving aid.

The question submitted by your letters is whether, assuming that her marriage settlement was lost by St. 1898, c. 425, § 2, her residence in Athol gives her a settlement under St. 1879, c. 242, § 2.

St. 1878, c. 190, § 1, cl. 6, re-enacting St. 1874, c. 274, § 2, provides that: "Any woman of the age of twenty-one years, who resides in any place within this State for five years together, without receiving relief as a pauper, shall thereby gain a settlement in such place." It was held in *Somerville v. Boston*, 120 Mass. 574, that this provision applied only to unmarried women. By St. 1879, c. 242, § 2, it was further provided that the clause quoted should be held to apply to married women who have not a settlement derived by marriage.

An examination of these statutes makes it evident that a married woman, having a settlement derived by marriage, could acquire no settlement under the clause quoted. As to such, the statute never existed.

St. 1898, c. 425, § 2, declares that all settlements acquired prior to 1860, are defeated, "*provided* that, whenever a settlement acquired by marriage has been thus defeated, the former settlement of the wife shall be thereby revived." This provision, however, does not revive a settlement which never existed. As above stated, the residence of the married woman in Athol did not give her any rights to a settlement, and consequently no settlement in Athol was ever acquired by her.

The case is different from that stated in *Fitchburg v. Ashby*, 132 Mass. 495, which dealt with a statute retroactive only in so far as it permitted rights under the statute to be acquired prior to the enactment of the statute.

MILITIA — COMMISSIONED OFFICER — PROVISIONAL MILITIA.

An officer holding a commission in the active militia, who did not enter the service of the United States in the Spanish War, but accepted an office in the provisional militia, authorized by St. 1898, c. 428, vacated his office in the active militia by accepting the office in the provisional.

Your letter of November 18, 1898, requires the opinion of the Attorney-General upon the following question, to wit: "Does an officer of the militia, holding a commission in the active militia, who does not enter the service of the United States, and who accepts a commission in the provisional militia, authorized under the provisions of c. 428, Acts of 1898, vacate his former commission on accepting the latter?"

To the
Adjutant-
General.
1899
January 10.

The provisional companies, battalions and regiments, authorized by St. 1898, c. 428, § 6, are, in my opinion, subject to the provisions of the general militia law, St. 1893, c. 367, excepting as otherwise specially provided.

Section 50 of the general militia law provides that: "When an officer holding a military commission is elected or appointed to another office in the militia, and accepts the same, such acceptance shall vacate the office previously held."

This section answers your inquiry. An officer who accepts an election to office in the militia vacates his former commission whether the new commission be in the active or in the provisional militia.

NORTHERN AVENUE BRIDGE — NORTHERN AVENUE — RIGHT OF COMMONWEALTH TO BUILD AND EXTEND.

The right of the Commonwealth, under the four-part agreement, to build Northern Avenue bridge and to extend Northern Avenue, is not impaired by St. 1880, c. 260, or by the deed made under authority of that statute.

I have your letter of November 30, 1898, submitting certain inquiries relating to St. 1880, c. 260. The statute authorized the New York & New England Railroad Company to purchase the twenty-five-acre lot, so called, on the Commonwealth's flats at South Boston, "subject to the right of the city of Boston

To the Board
of Harbor and
Land Commis-
sioners.
1899
January 11.

to lay out Northern avenue over said parcel as provided in an indenture of four parts between the Commonwealth, the Boston and Albany Railroad Company, the Boston Wharf Company and the city of Boston, dated the twenty-fourth day of June, eighteen hundred and seventy-three," for the sum of one million dollars. The statute further provides that, upon the payment of two hundred thousand dollars thereof, "said New York and New England Railroad Company shall have all the rights of the Commonwealth under said indenture to build Northern avenue bridge and extend Northern avenue to some existing street on the northwesterly side of Fort Point channel, for and on account of said city, and to reimbursement therefor from said city, as provided in said indenture." The statute further provides: "Said railroad company shall also have authority to build, at its own cost, Northern avenue bridge, in anticipation of action by the said city, subject, however, to all rights of said city under said indenture."

The question submitted in your letter, in substance, is whether, under this statute and the deed given by authority thereof, the Commonwealth has parted with its rights as to the building of the Northern Avenue bridge under said indenture.

The Commonwealth, at the time of the execution of the four-part agreement, was the owner of a large tract of land situated easterly of Fort Point Channel, of which the twenty-five-acre lot referred to in the statute of 1880 was a small portion. Under the terms of the indenture, the city of Boston, in consideration of certain obligations entered into by the Commonwealth and the other parties thereto, covenanted and agreed, upon certain conditions stated therein, to build, within twelve months after the request of the Board of Harbor and Land Commissioners, approved by the Governor and Council, a bridge for public travel over Fort Point Channel, in extension of Northern Avenue. The indenture also provided for the laying out of Northern Avenue over the land of the Commonwealth and of the Boston & Albany Railroad Company, which corporation was the owner of land deeded to it by the Commonwealth.

The indenture further provided that, in case the city of

Boston should fail to build Northern Avenue bridge and extend the avenue, the Commonwealth might build the bridge and extend the avenue; and in such case the city of Boston should pay to the Commonwealth the cost thereof, not exceeding a specific sum.

The building of the bridge and the extension of the avenue were necessary to the proper development of the land of the Commonwealth, not merely of the twenty-five-acre lot which was adjacent to the channel, but of all the other land lying to the eastward; and the plain purpose of the indenture was to secure the performance of the work, at the option of the Commonwealth, either by the city of Boston, or, by the Commonwealth, at its expense.

St. 1880, c. 260, § 1, par. 1, provides, in terms, it is true, that the railroad company "shall have all the rights of the Commonwealth under said indenture to build Northern Avenue bridge and extend Northern Avenue;" but in view of the circumstances, which must have been known to the Legislature when the statute was enacted, I do not think that it was the intention of the Legislature to give up the rights of the Commonwealth, but rather to admit the New York & New England Railroad Company, it being the grantee of a portion of the tract to be benefited, to an equal right in the enforcement of the covenant to build the bridge and extend the avenue. I am of the opinion that the words "shall have all the rights of the Commonwealth under said indenture" are to be taken to mean that the railroad company shall share and exercise, in common with the Commonwealth, all its rights to have the bridge built and the avenue extended. Such a construction does not unduly violate the letter of the statute, and is consistent with what may be supposed to have been the purpose of all parties in its enactment. It would be unreasonable to suppose that the Commonwealth, being the owner of a large tract, of which the twenty-five-acre lot was only a small portion, all of which alike would be benefited by the building of the bridge, intended, in selling the twenty-five-acre lot to the railroad company, to part with the rights it had acquired under the indenture.

It is unnecessary to consider how far action taken by the railroad company under the statute would have concluded the rights of the Commonwealth; for, as I am informed, no action whatever has been taken. The city cannot avoid its obligation by reason of the statute, for it has not been prejudiced or injured by its enactment nor by any acts done under it. The deed to the railroad contains no express assignment of the rights of the Commonwealth, under the four-part agreement, to have the bridge built and the avenue extended. The railroad, therefore, has no right of interference in the matter, except under the statute, which, for the reasons I have stated, is not to be interpreted as taking away the rights of the Commonwealth.

Upon the whole, therefore, I am of the opinion that the right of the Commonwealth to build Northern Avenue bridge and extend Northern Avenue is not impaired by St. 1880, c. 260, or by the deed made under the authority thereof.

GAS COMPANY — NEW ENGLAND GAS AND COKE COMPANY —
UNINCORPORATED VOLUNTARY ASSOCIATION — RETURNS TO
GAS AND ELECTRIC LIGHT COMMISSIONERS.

St. 1886, c. 346, § 2, providing that "manufacturing companies in which the manufacture of gas is a minor portion of their business shall only be required to keep accounts of the expenses and income of their gas business," was intended to exempt manufacturing corporations which carry on a gas business in addition to and entirely separate from their principal business, and does not apply to a company whose business is the manufacture of coal by one process into gas, coke and other by-products.

While a gas corporation becomes subject to the jurisdiction of the Board of Gas and Electric Light Commissioners as soon as it is incorporated, an unincorporated voluntary association has no greater rights and is subject to no greater duties or liabilities than an individual, and is not, therefore, subject to the jurisdiction of the Board, and is not required to make returns to the Board until it comes into actual relations with the gas consumers.

To the Board
of Gas and
Electric
Light Com-
missioners.
1889
January 28.

I have the honor to acknowledge receipt of two communications from the Board of Gas and Electric Light Commissioners, notifying the Attorney-General that the New England Gas and Coke Company appears to have violated the provisions of St. 1885, c. 314, § 7.

The first letter, dated December 12, 1898, sets forth that the company "has failed to make its annual return to the Board, in the form prescribed by this Board, on or before the second Wednesday of September, A.D. 1898."

The second letter, dated January 19, 1899, states that the company "has refused and neglected to furnish any statement of certain information required by the Board, touching the condition, management and operations of the company, although requested so to do on the twelfth day of December, 1898."

These notifications are given to the Attorney-General under the provisions of § 12 of said chapter, which provides that, whenever any gas company violates or neglects to comply with the provisions of the statutes, the Board shall give notice thereof, in writing, to such corporation and to the Attorney-General, who "shall take such proceedings thereon as he may deem expedient." Proceedings against the company being thus left to the discretion of the Attorney-General, I have deemed it my duty to consider carefully whether, upon the facts stated, the company has violated the provisions of the statute. As a result of my examination, I am clearly of the opinion that no violation of law appears, and that I should not institute proceedings against the company. Although your Board is not responsible for the action of the Attorney-General, it is due to it that I state briefly the reasons which have led me to these conclusions.

The section in question (St. 1885, c. 314, § 7) provides that: "Every gas company shall annually make a return to said board in a form and at a time prescribed by said board, setting forth the amount of its authorized capital, its indebtedness and financial condition on the first day of January preceding and a statement of its income and expenses during the preceding year, together with its dividends paid or declared, and a list containing the names of all its salaried officers, and the amount of the annual salary paid to each; and said return shall be signed and sworn to by the president and treasurer of said company and a majority of its directors. Every such company shall also at all times, on request, furnish any statement of information required by the board concerning the condition, management and operations of

the company, and shall comply with all lawful orders of said board."

The New England Gas and Coke Company is not a corporation. Your letter assumes, however, that the company is made subject to the provisions of the section quoted, by St. 1886, c. 346, § 7, which provides that, in the construction of the statute, the provisions of which it is alleged have been violated, "the terms 'gas company' and 'corporation' shall include all persons owning or operating works for the manufacture and sale of gas for heating or illuminating purposes within the Commonwealth."

Before discussing what I deem to be the principal question involved, it may be well to allude briefly to one of the claims made by the company as a reason for not making the returns required by the statute. St. 1886, c. 346, § 2, after providing that the returns to be made by gas companies shall be made on or before the second Wednesday of September in each year, further provides "that manufacturing companies in which the manufacture of gas is a minor portion of their business shall only be required to keep accounts of the expenses and income of their gas business." I am informed that one of the contentions of the New England Gas and Coke Company is that it is not required to make returns to your Board, because the manufacture of gas is to be a minor portion of its business, and that it has submitted estimates tending to show that the value of the gas product will be less than that of the coke manufactured. I have no difficulty with this contention. It is conceded that in all essential respects the process of the company in question is similar to that of other gas companies manufacturing coal gas, the only difference claimed being that by the methods designed to be employed by this company a relatively larger proportion of coke will be manufactured. When coal is treated for the production of gas, the resulting products include gas and coke and ammonia. Ordinarily, the coke is of less value than the gas. The New England Gas and Coke Company claims that its product of coke will be more valuable than the gas, although it admits that no separate account can be kept of the expense of

manufacturing gas, which shall not include all the expenses of treating the coal employed.

The statute upon which the company relies was intended to exempt manufacturing corporations which carry on a gas business in addition to and entirely separable from their principal business, as to which an account of the expenses and income from such incidental business might be accurately determined, But the business of this company is the manufacture of coal. by one process, into gas, coke and other by-products. This is its principal, and, so far as I know, its only, business; and it is not exempt from making returns merely because it may happen that the produced coke is worth more than the gas. Both are products of one process of manufacturing.

If the contention of the New England Gas and Coke Company were sound, any gas company would be exempt from making a return whenever it could show that the income from what are usually termed its *by-products* exceeded that derived from the sale of gas. Such a construction would make the enforcement of the salutary provisions of the statute, which are designed for the protection of the gas-consuming public, dependent entirely upon the market value of the various products of the gas retort. This, obviously, was not the intention of the Legislature, and is not a reasonable construction of the provisions in question.

My principal difficulty arises from the fact that the gas company is not now engaged in the manufacture or sale of gas. If it were a gas corporation, this fact would make no difference. Such a corporation becomes subject to the jurisdiction of your Board as soon as it is incorporated. It is essentially, and by express provisions of its charter, a gas corporation. It exists as such under the authority and by sanction of the Legislature. It cannot plead to the jurisdiction of your Board that it is not engaged in the manufacture of gas; for it is, nevertheless, a gas corporation, subject from its inception to all the provisions of law applicable to such corporations.

The New England Gas and Coke Company, however, is not a corporation. but an unincorporated voluntary association. The title is but a designation of certain trustees holding prop-

erty upon certain trusts set forth in a declaration of trust dated September 30, 1897. The declaration of trust provides that the trustees shall use the property conveyed to them in trust "in manufacturing, buying, selling and dealing in coal, oil, coke or gas, or all the products thereof of every description and any business similar thereto, including electric business of all kinds;" and the trustees are to divide the profits of the business ratably among certain persons called shareholders, in proportion to the number of shares held by them. The original shareholders, with the number of shares, are stated in the declaration, and it is provided that certificates of shares shall be issued to each shareholder, which certificates may be transferred to others whose names shall be recorded on the trustees' books, the transferee to be held to have assented to the terms of the trust by the fact of his acceptance of the transfer of the shares. The death of a shareholder does not determine the trust nor give his personal representative a right of accounting, but simply entitles him to a new certificate of stock, upon the acceptance of which he succeeds to all the rights of the deceased under the trust. No shareholder has the right to call for a partition accounting or a division of the trust property.

Upon the death or removal of any trustee, his successor is to be appointed by the remaining trustees or by the court, and such new trustee shall have the same powers and be subject to the same duties as an original trustee. Unless terminated by the action of a percentage of the stockholders, the trust is to continue for fifty years, unless all of the trustees now living shall have died more than twenty-one years prior to the expiration of fifty years, in which case the trust is to terminate at the expiration of such twenty-one years. At the termination of the trust the property is to be divided or sold and divided among the shareholders. The holders of two-thirds of the shares may alter or terminate the trust at a properly called meeting.

The trustees are empowered, among other things, to make certain contracts, borrow money, give notes or other obligations, mortgage the trust property to secure the payment of such obligations or notes, and, generally, to do all things neces-

sary to execute the trust; but express limitations are put upon their powers, so that they are not authorized to bind the shareholders personally by any contract or by any act, neglect or default; and this exemption applies also to the trustees themselves; but it is provided that any party injured shall have recourse for satisfaction solely to the trust estate. Every note, bond, obligation or contract shall give notice of these limitations on the power of the trustees by a direct reference to the declaration of trust.

It is plain that these provisions, while in many respects resembling those peculiar to corporations, do not constitute the New England Gas and Coke Company a corporation. Nothing less than sovereign power can create a corporation. There is no such thing as a corporation (excepting, perhaps, a corporation sole) at common law. The essential features of corporations can only exist by legislative authority, either under general laws authorizing the formation of corporations, or under special charters. The company in question has no special charter, and it is not contended, and cannot be claimed, that it has complied with, or attempted to comply with, the general statutes authorizing the forming of corporations. There is in this Commonwealth no form of association midway between a corporation and a partnership. Although a partnership is in the form of a joint stock company, it is held to be merely a partnership. *Tappan v. Bailey*, 4 Met. 529; *Tyrrell v. Washburn*, 6 Allen, 466; *Edwards v. Warren Linoline Works*, 168 Mass. 564. It is immaterial that the shares of the company are transferable. *Phillips v. Blatchford*, 137 Mass. 510. See also *Ricker v. American Loan & Trust Co.*, 140 Mass. 346.

So far, therefore, as the provisions of the statutes relating to gas companies are applicable only to gas corporations, they cannot be enforced against the New England Gas and Coke Company. It has clothed itself in the garb and assumed the form and appearance of a corporation; but it is, nevertheless, a voluntary association of individuals, without corporate power or authority, and has no greater rights and is subject to no greater duties or liabilities than any association of individuals,

or even than any individual. For the purposes of the statutes relating to the powers of your Board, it is to be treated precisely as though it were an individual.

This being so, what duty of making returns did the Legislature intend to impose upon an individual engaging or proposing to engage in the manufacture and sale of gas? A statute requiring from individuals engaged in business in this Commonwealth information regarding the condition, management and operations of their business is one which must necessarily impose upon such individuals special burdens and duties not required of other classes in the community. The statute purporting to impose such burdens must, therefore, in my opinion, be strictly construed. Black on Interpretation of Laws, p. 300.

In view of these principles, which are fundamental and well settled, I cannot believe that it was the intention of the Legislature to impose upon an individual any duty of making returns or of furnishing information as to his private business. The building of factories and retorts by an individual, even the making of executory contracts for the future sale and delivery of gas to a corporation, are matters of private business, so far, at least, as relates to the contractor. The supervision of the Commonwealth over the operations of an individual is only warranted when, by actually engaging in the business of supplying gas, he serves the public. There is a clear distinction in this respect between an individual and a gas corporation. As I have already pointed out, the corporation is the creation of the Commonwealth, acquires its rights under the laws of the Commonwealth, and, whether engaged in business or not, is and should be subject to all the provisions governing such corporations. An individual, on the other hand, is not within the purview of the statute, and does not become subject to the jurisdiction of your Board, by reason of any intentions he may have formed or any preparations he may have made, until he comes into actual relation with the gas consumer.

I am of opinion, therefore, that the New England Gas and Coke Company, being but a voluntary association of individuals,

and not being engaged in the manufacture or sale of gas, is not at present required to make returns to your Board, nor to answer inquiries as to its business or financial condition.

PAUPER — MARRIED WOMAN — DOMICILE — SETTLEMENT.

A woman whose husband has never had a domicile in this Commonwealth, and who has deserted her, may by her own separate residence acquire a settlement here.

The doctrine that a married woman's domicile is that of her husband has no application to this case.

That doctrine does not apply so as to give a woman who came to this Commonwealth from a foreign country, three years after her husband, a constructive residence here, during the three years, which can be tacked on to her actual residence here, for the purpose of giving her a settlement.

Your letter of December 3, 1898, states two cases, which, in my opinion, are governed by the same general considerations.

First. — One who is now a pauper came with his mother to this Commonwealth and to Worcester in 1874. He has acquired no settlement in his own right. None of his ancestors except his mother ever lived in Massachusetts. His father and mother last lived together in the State of New York, in the town of Champlain, where he was born. His father there deserted his family and removed to Michigan, where he lived until his death, in 1896. His mother, after her husband's desertion, came to Worcester, where she resided, without receiving public aid, from 1874 to 1889.

The question submitted by your letter is, whether the mother of the pauper acquired a settlement by her residence in Worcester, which descended to her son. The settlement of the mother is claimed under the provisions of St. 1874, c. 274, as amended by St. 1879, c. 242, providing that married women who have not a settlement derived by marriage, who reside in any place within the State for five years, shall thereby gain a settlement in such place.

In *Stoughton v. Cambridge*, 165 Mass. 251, it was held that a settlement was gained by a married woman in the defendant

To the Super-
intendent of
State Adult
Poor.
1899
February 2.

city because her husband's domicile was there for a period of more than five years, although her own domicile, excepting so far as it was that of her husband, did not remain constant, the court (Allen, J.) saying, "It still remains the law of Massachusetts that ordinarily a married woman's domicile is that of her husband."

I do not think, however, that the doctrine of *Stoughton v. Cambridge* is applicable to the present case. The husband had no domicile in Massachusetts, and never had. He had deserted his wife in New York, and removed to another State. After the desertion she had come to Massachusetts, and there resided. In my opinion, the legal fiction that wherever a wife may be actually, she is constructively with her husband, does not apply to this case. Many exceptions have grown up to the ancient doctrine. At the present day, the law recognizes the wife as having a separate existence and separate rights and separate interests; the ancient unity is severed, so that the wife stands upon an equal footing with her husband as to property, torts, contracts and civil rights. He now has no more control over her than she over him, and there seems to be no reason why she may not acquire a separate residence when she resides within and her husband without the State, and especially when he has forfeited his marital rights by his misconduct. To fix inevitably her residence with her husband would subvert her statutory right of voting and holding office, and would compel an innocent wife to make her home in whatever voting precinct her offending husband might choose to live. *Cheever v. Wilson*, 9 Wall. 108, 124; *Shute v. Sargent*, 67 N. H. 305; *Burtis v. Burtis*, 161 Mass. 508. See also *Thorndike v. Boston*, 1 Met. 242, 245.

Without attempting to establish any rule applicable to all cases, I am clearly of the opinion that, upon the case stated, the mother of the pauper, by her residence in Worcester, gained a settlement there, notwithstanding the residence of her deserting husband in Michigan.

Second. — The second case stated in your letter illustrates still more forcibly the absurdity of the proposition that for

purposes of settlement the wife's domicile is to be construed in all cases as that of her husband.

The pauper in this case came to this country in February, 1895, being then about two years of age. His father, a native of Ireland, lived in Springfield, Mass., from 1892 to 1898, but without acquiring a settlement. His mother first came to this country, to Springfield, in 1895, where she resided for three years without receiving aid. By tacking on to her actual residence two years of constructive residence, while her husband was living here and before she ever saw this country, it is contended that she had resided in Massachusetts for five years. I do not think the statute can be construed to cover such a case, nor that the doctrine of *Stoughton v. Cambridge* applies to it.

PAUPER — UNMARRIED WOMAN — RESIDENCE — SETTLEMENT.

The retroactive provision of St. 1874, c. 274, which gives a settlement to a woman by reason of residence, though such residence accrued before its enactment, does not apply to the case of an unmarried woman who at the time of its enactment was not a resident of Massachusetts.

Your letter of October 28, 1898, states the following case: —

A female pauper, who was born in Ireland in 1840, and who came to America and to the town of Winchester, Mass., in November, 1862, and resided there as an unmarried woman from that date until her removal to California in May, 1868, returned from California to Winchester, September, 1896, and was committed to Danvers Insane Hospital, April 21, 1897. While in California she was committed to a lunatic hospital in 1872, where she remained until removed therefrom by her nephew in September, 1896, and returned, by him, to Winchester. During her prior residence in the town of Winchester she had received no public aid.

To the Super-
intendent of
State Adult
Poor.
1899
February 2.

Your letter requires the opinion of the Attorney-General upon the question whether the prior residence of the pauper in Winchester for more than five years, without receiving assist-

ance, gives her a residence in Winchester, under the retroactive provisions of St. 1874, c. 274.

The statute provides, in § 2, that: "Any woman of the age of twenty-one years who resides in any place within this state for five years together without receiving relief as a pauper shall thereby gain a settlement in such place;" and, in § 3, that: "Any unsettled person shall be deemed to have gained a settlement upon the completion of the residence and taxation herein required, though the whole or part of the same accrues before the passage of this act."

Her removal to California would not, of itself, operate to defeat her settlement, if the retroactive provisions of the statute apply to her case, so that she is deemed to have acquired a settlement prior to her removal. *Wilbraham v. Sturbridge*, 6 Cush. 61. If, therefore, the statute quoted is to be interpreted as including in its retroactive provisions all persons, whether living within or without the State at the time of its enactment, she must be deemed to have acquired a settlement in Winchester by her five years' residence in that town before removing to California.

I am of opinion, however, that this is not a reasonable construction of the act, and that it must be taken to refer only to unsettled persons residing within the Commonwealth at the time of its passage, and for whom the Commonwealth was or might be under duty to provide.

In *Taunton v. Boston*, 131 Mass. 18, a statute containing similar retroactive provisions was held not to give a settlement by derivation to the child of an unsettled person who died before its enactment. The case of *Fitchburg v. Athol*, 130 Mass. 370, is more nearly in point. It was held in that case that the statute now under consideration was not intended to give a settlement to persons who voluntarily ceased to be residents of the State twenty years before it was enacted, and, by derivation, to the descendants of such persons. Although neither of these cases can be said to be directly in point, they go far to sustain the position that the purpose of the Legislature was to deal only with persons living and residing within

the Commonwealth at the time of the enactment of the statute. It having been held that the statute does not apply to descendants of persons not living at the time of its enactment, nor to the descendants of persons who had removed from this Commonwealth before its enactment, the same considerations would logically lead to the exclusion of non-residents themselves, and I have no doubt that the court would so hold.

I am of opinion, therefore, that the pauper in question is not settled in Winchester.

PAUPER — TEMPORARY AID TO UNSETTLED POOR.

St. 1898, c. 425, § 5, does not apply to persons whom the overseers of the poor are maintaining in their local almshouses, whose settlements are defeated by other sections of that act.

Your letter of December 8, 1898, requests my opinion upon the construction of St. 1898, c. 425, § 5. Your letter states that other sections of the same act have unsettled many persons now supported in almshouses in the towns in which they were formerly settled, and that in some cases the town authorities of such towns claim that they have a right to charge for the support of such paupers, under the provisions of the section in question.

To the Super-
intendent of
State Adult
Poor.
1899
February 7.

The section was enacted in substitution of Pub. Sts., c. 84, § 18. It is apparent, from the reading of both the section under consideration and said § 18, that the purpose of the Legislature was to provide aid for the unsettled temporarily poor and indigent in their own homes, and thus to prevent the sundering of family ties, which must have occurred had no such provisions been enacted. Neither the former nor the present act is intended to include persons whom the overseers of the poor are maintaining in their almshouses, as, by their removal thereto, the overseers are deemed already to have decided that the almshouse, and not their homes, was the proper place for them to receive public aid.

COUNTY ACCOUNTS — OFFICERS — SERVING OF WARRANTS — FEES.

Officers serving warrants are entitled to charge for services and expenses. The charge for services comprises fifty cents for each person upon whom service is made, and an allowance for "travel." Expenses are limited to actual and necessary disbursements, and may be charged in addition to the item of constructive travel.

Railroad fares are not included in "travel," and may be charged in addition thereto. If an officer has charged twice for expenses, the amount may be withheld in any further settlement between him and the paymaster or clerk whose duty it is to pay him.

If an officer knowingly charges for expenses which he did not incur, it constitutes the offence of obtaining money under false pretences.

To the
Controller
of County
Accounts.
1899
February 9.

Your letter of December 22, 1898, submits a number of questions on which the opinion of the Attorney-General is desired. They can well be answered together, as the same considerations apply to all.

Officers serving warrants are entitled to charge for services and expenses. The charges for services comprise fifty cents for each person on whom service is made, and an allowance, dependent upon the number of miles travelled, for what is called in the statute "travel." Although so called, it is, in fact, intended as a sliding scale of compensation for serving warrants. These two items may be charged in every case where a warrant is served, excepting when more than one process is served upon the same defendant on the same day. With this exception, officers may charge fifty cents for service on every defendant, and constructive travel upon every warrant, even though travel is thus charged more than once for the same journey.

It is otherwise with expenses, which can be charged and collected but once, whether for travelling expenses, conveyance of prisoner or for aid. Whenever, in the service of a warrant, an officer incurs expense which is necessary and reasonable, he may charge for it. Such expenses, for example, as railroad fares, are not included in or covered by the items of constructive travel, and may be charged in addition thereto. These charges are limited to actual disbursements, except that, if an officer uses his own team, he may charge fifteen cents a mile

therefor, in addition to the constructive travel to which he is otherwise entitled.

If, therefore, in any case, an officer has charged twice for expenses incurred by him, it is over-payment, and the amount may be withheld in any further settlements between him and the paymaster or the clerk whose duty it is to pay him. If he has knowingly charged for expenses which he did not incur, it amounts to the offence of obtaining money by false pretences.

I believe the foregoing is an answer to all the questions submitted.

BOARD OF EDUCATION — NORMAL SCHOOL TEACHER — SPECIAL SERVICES AT TEACHERS' INSTITUTES.

Pub. Sts., c. 21, § 8, providing that no person shall at the same time receive more than one salary from the State treasury, does not prohibit the State Board of Education from employing normal school teachers, with fixed annual salaries, at teachers' institutes, and paying them from the appropriation made for the use of the Board.

The section does not apply to special services for a department or commission.

Your letter of January 7 states that it is proposed by the Board to employ normal school teachers for service in teachers' institutes, and to pay them therefor from an appropriation made for the use of said Board. These teachers are paid fixed annual salaries, and service in institute work is no part of the regular duties for which normal school teachers are paid.

To the State
Board of
Education.
1899
February 18.

Pub. Sts., c. 21, § 8, provides that: "No person shall at the same time receive more than one salary from the state treasury." The question upon which you desire my opinion is, whether the employment of teachers for institute work, as proposed, is in violation of the section quoted.

The section has always been construed, according to its terms, as referring only to salaries fixed and established by some law of the General Court. It does not include compensation for special services under the employment of a department or commission. An allowance for such employment is not a "salary," within the meaning of the word as used in the statute.

I am of opinion, therefore, that teachers employed as proposed may properly be paid from the appropriation for teachers' institutes at your disposal.

BASTARDY COMPLAINTS — ENTRY FEE.

The entry fee required in civil cases must be paid upon the filing of bastardy complaints.

To the
Controller
of County
Accounts.
1899
February 18.

St. 1876, c. 227, § 5, provides that: "In proceeding under the bastardy laws, the cost shall be the same as in civil cases, and in addition thereto, a fee . . . for receiving complaint and issuing warrant."

St. 1897, c. 237, § 1, repeals so much of the section above quoted as provides for a fee for receiving complaints and issuing warrants in bastardy cases. Other fees remain unchanged, and it follows that the entry fee required to be paid in civil cases must be paid upon the filing of bastardy complaints.

SPANISH WAR — TERMINATION.

The war was not ended by the ratification of the treaty of peace by the Senate of the United States.

To the
Treasurer
and Receiver-
General.
1899
February 18.

The opinion of the Attorney-General is desired upon the question when the present war will be at an end. The opinion is required because of certain provisions in St. 1898, c. 561, relating to the payment of a monthly bounty to soldiers.

It is sufficient to say, at the present time, that in my opinion the war was not ended by the ratification of the treaty of peace by the Senate of the United States. When peace is finally concluded may be a question to be discussed hereafter, and I will consider the matter further if you will call my attention to it again after the treaty has been ratified by the Spanish government.

SAVINGS BANKS — FIRST MORTGAGE OF REAL ESTATE —
PROPERTY LEASED FOR NINETY-NINE YEARS.

A lessee of land for ninety-nine years, who erects a building thereon, cannot give such a mortgage on the building or the land, or both, as savings banks must take under a statute allowing them to invest their deposits in first mortgages of real estate in this Commonwealth.

Your letter of February 20 states that: "It is proposed by certain parties, who are unable to purchase outright a parcel of land, to take a lease thereof for a term of ninety-nine years, and to erect thereon a building which may cost one million dollars;" and requests the opinion of the Attorney-General upon the question whether it would be lawful for a Massachusetts savings bank to loan money to the lessee, secured by a mortgage on the building, or land, or both.

To the Savings
Bank Commis-
sioners.
1899
March 4.

St. 1894, c. 317, provides, in § 21, that deposits of savings banks may be invested in "first mortgages of real estate situated in this Commonwealth." Unless the property, therefore, is real estate, it would not be lawful for savings banks to loan money upon it. A lease for any less time than one hundred years is personal property. Pub. Sts., c. 121, § 1. *Ex parte Gay*, 5 Mass. 419. The lessor may enter at any time for breach of the covenants of the lease, and recover the land free from any encumbrance made or suffered by the lessee. The lessee, therefore, cannot give a mortgage on the land leased which would be a "first mortgage on real estate."

If there is no agreement in the lease as to whom the building shall belong, it is real estate belonging to the lessor, being neither a domestic nor a trade fixture. *Wall v. Hinds*, 4 Gray, 256, 271. If, on the other hand, there is an agreement in the lease that the building, when erected, shall belong to the lessee, it is personal property, which the lessee may remove while he is in possession, but which he may not remove after his lease has expired. *Burk v. Hollis*, 98 Mass. 55. Moreover, in case the lessor enters and terminates the lease for breach of condition thereof, the lessee forfeits his right to remove the building,

even if there is an agreement in the lease that it shall belong to the lessee. *Kutter v. Smith*, 2 Wall. 491.

It follows, therefore, that in the case stated it would not be lawful for a Massachusetts savings bank to loan money to the lessee secured by a mortgage upon the building, or land, or both.

PAUPER — SETTLEMENT.

A person who derived a settlement in Boston from his father, which prevented him from gaining a settlement there in his own right under St. 1874, c. 274, is within the exception of St. 1898, c. 425, and his derivative settlement stands.

To the Super-
intendent of
State Adult
Poor.
1899
March 4.

Your letter of February 28 requires my opinion upon the settlement of a certain person named therein, the facts being as follows: He was born in Boston in 1829, and has always resided in Boston. He derived a settlement in Boston from his father, who died in Boston in 1876, at the age of seventy-nine years. His mother died in Boston, at the age of eighty-seven years. There was a period of five years between 1872 and 1877 during which it is admitted that the person in question resided in Boston five full years without receiving public aid, and paid the necessary number of taxes to give him a settlement under the retroactive clause of St. 1874, c. 274.

That statute, after prescribing certain conditions of settlement, provides in § 3 that: "No existing settlement shall be changed by any provision of this act unless the entire residence and taxation herein required accrues after its passage; but any unsettled person shall be deemed to have gained a settlement upon the completion of the residence and taxation herein required, though the whole or a part of the same accrues before the passage of this act." Under this statute the person in question could gain no settlement, inasmuch as he already had a settlement derived from his father and acquired prior to 1860. His derivative settlement from his father prevented him from acquiring a settlement in his own right. *Salem v. Ipswich*, 10 Cush. 517, 520.

St. 1898, c. 425, defeats all settlements not fully acquired subsequent to May 1, 1860, "except where the existence of such settlement prevented a subsequent acquisition of settlement in the same place." The settlement of the person in question acquired before 1860 prevented the subsequent acquisition by him of a settlement in the same place. The case, therefore, is within the exception of the statute, and the original settlement stands.

This conclusion is confirmed by the case of *Adams v. Ipswich*, 116 Mass. 570, in which the court (Wells, J.) says: "If the older settlement prevented the subsequent acquisition of the more recent one, the former is preserved by the exception in the St. of 1870." The exception referred to in the opinion of the court is similar in its terms to that in the statute of 1898.

HARBORS — SELECTMEN — FISH WEIRS.

The selectmen of a town have no right to license fish weirs in a harbor bordering on the town beyond the harbor line.

Your letter of February 9 requires the opinion of the Attorney-General upon the following question, to wit: "Have the selectmen of Provincetown the right to license weirs in the harbor beyond the harbor line?"

To the Board
of Harbor and
Land Com-
missioners.
1899
March 29.

The right of controlling and regulating the sea and seashores is in the sovereign. Under the early laws of Massachusetts, a structure built into the tide water by the owner of the shore might be declared a nuisance if it interfered with the rights of the public reserved to them by the Colonial Ordinance of 1641-47. To avoid the necessity of determining the question of nuisance in each particular case, the Legislature from time to time established lines in certain harbors beyond which no wharf or pier might be built into the sea. St. 1837, c. 229, fixing the harbor line of the harbor of Boston, was an example of this class of legislation. The right of the Legislature to establish such lines was sustained in *Commonwealth v. Alger*, 7 Cush. 53, which held that a wharf could not be extended beyond the

harbor line, even though it appeared that it did not obstruct navigation.

St. 1866, c. 149, established a Board of Harbor Commissioners, and authorized it, among other things, to prescribe harbor lines, beyond which no wharf, pier or other structure could be extended into the harbor. The lines so prescribed, however, were subject to the approval of the Legislature. Under the authority of this statute, the Harbor Commissioners prescribed lines for the harbor of Provincetown, which were approved by the Legislature. St. 1867, c. 268.

In 1869 an act was passed "to further protect the rights of the Commonwealth in tide waters." St. 1869, c. 432. Section 1 provides: "All authority or license that may be hereafter granted . . . by the Commonwealth, to any person or corporation to build any structure upon ground over which the tide ebbs and flows . . . whether it be private property or the property of the Commonwealth, shall be subject to the following conditions, whether they be expressed in the act or resolve granting the same or not, namely, viz.: such license or authority shall be revocable at any time, at the discretion of the legislature, and shall expire at the end of five years from its date. . . . All things done under such license or authority shall be subject to the determination and approval of the harbor commissioners. . . . If the legislature shall establish harbor lines within the outer line covered by such license or authority, *then such license or authority shall be construed to be limited by and not to extend beyond such harbor line.*"

The next general law regulating structures in tide waters was St. 1872, c. 236, entitled "An act to regulate the building of wharves and other structures in tide waters." Section 2 of this act expressly provided that no license for the construction of a wharf or other structure below high-water mark should have any effect beyond a harbor line, "except in relation to a structure authorized by law outside such line."

The statutes above referred to, which were re-enacted in the Public Statutes, show clearly that the privilege of building in the sea beyond low-water mark is intended to be carefully

guarded, and that in harbors no structure can be built beyond the harbor line, except by express authority of the Legislature.

It remains to be considered whether the statute authorizing the construction of fish weirs is to be taken as an exception to this uniform course of legislation. St. 1856, c. 50, § 1, as re-enacted in Pub. Sts., c. 91, § 70, provides that: "The selectmen of a town lying upon tide water may authorize in writing any person to construct fish weirs in said waters within the limits of such . . . town for a term not exceeding five years: *provided*, such weirs cause no obstruction to navigation, and do not encroach on the rights of other persons." It is plain that this is not intended as an exception to the general rule. It authorized selectmen to grant such licenses, but only in places where the building of structures in tide waters is not expressly forbidden by other provisions of law. To construe the statute otherwise would be to authorize the selectmen, at their discretion, to nullify the whole course of legislation intended to prevent the obstruction of the harbors of Massachusetts, and to give to the selectmen powers which are denied even to the Harbor Commissioners.

I understand, however, that it is contended that St. 1881, c. 196, § 1 (Pub. Sts., c. 27, § 2), extending the boundary lines of towns bordering on the sea to the line of the Commonwealth, operates to give to towns jurisdiction over tide waters coextensive with such limits, or one marine league from shore. This act, however, was not intended to take away the general jurisdiction of the Commonwealth over its tide waters, nor to repeal or affect regulations established by the Commonwealth affecting them. It did not give towns any property rights whatever in the sea, nor enlarge their rights over the sea. Its only purpose was to extend the jurisdiction of towns for civil and criminal proceedings, so that such jurisdiction should be coextensive with that of the Commonwealth. *Commonwealth v. Peters*, 12 Met. 387. Before the statute in question was enacted, the boundaries of counties were already coextensive with the limits of the Commonwealth, and the statute which

extended the boundaries of towns probably merely affirmed the common law giving towns the same coextensive jurisdiction. In New York it was early decided that a similar act extending the limits of a town over the tide waters did not give the town the right to regulate the digging of clams below low-water mark. *Palmer v. Hicks*, 6 Johns. 133.

This statute cannot be taken to give towns any authority to construct fish weirs, where the Commonwealth, in the exercise of its jurisdiction over the waters, has forbidden the building of any structures whatever. I am of opinion, therefore, that your question should be answered in the negative.

MILITIA — PROVISIONAL MILITIA.

A soldier of the active militia, relieved from duty because he is unable to go into the United States service with his command, does not forfeit his standing in the active militia by enlisting in the provisional militia, and may be ordered by the Commander-in-Chief to rejoin his regular company on his return.

The commander of an organization would not be warranted in discharging such a soldier because he enlisted in the provisional militia.

Men of the provisional militia may be transferred to the active militia by the Commander-in-Chief with or without their application or the consent of the company commanders from and to whom transfer is desired.

To the Adjutant-General.
1899
March 30.

When, upon the declaration of war by the United States against Spain, many of the officers and privates of the Massachusetts Volunteer Militia offered their services to the United States, a question arose as to the continuance of their standing in the State militia. To settle this question, and to encourage enlistments by members of the militia into the United States service, a statute was enacted — St. 1898, c. 428 — providing that members so enlisting should not lose their position and rank in the militia; but that the officers who so enlisted should be granted leave of absence, and the privates should be furloughed until thirty days after their discharge from the United States service.

The quota of Massachusetts under the call of the President was filled by designating certain regiments and companies of the State militia, giving their members the opportunity of enter-

ing the service of the United States, while preserving as far as possible their regimental and company organization. Nearly all the officers and men of the First Regiment of Heavy Artillery, of the Second, Fifth, Sixth, Eighth and Ninth Regiments of Infantry and of the Naval Brigade, entered the service of the United States under this call, — so many, in fact, that, by order of the Commander-in-Chief, dated May 18, 1898, those who did not enter the service of the United States were relieved from duty until further orders.

As a consequence, the regiments and companies referred to were entirely depleted. They were never disbanded, however, and the State regimental and company organizations remained intact, and their officers and privates still continued to belong to them, as State regiments and companies. Those in the service of the United States were, by the provisions of the statute above referred to, relieved from State duty until their completion of such service; and those remaining at home by the order of the Commander-in-Chief, were relieved from all military duty until the further order of the Commander-in-Chief. But none of them were discharged from the State militia.

The same statute (St. 1898, c. 428) authorized the Commander-in-Chief to raise and organize provisional companies, to be assigned to provisional battalions and regiments. Enlistments in such companies were to continue for a period not longer than thirty days after the declaration of peace, and the commissions of all officers elected or appointed for such provisional organizations were to expire not later than thirty days after the close of the war. Under the general orders above referred to, officers and men who had not enlisted in the service of the United States, and who were relieved from duty until further orders of the Commander-in-Chief, were authorized to enter the provisional militia. This order cannot be taken as authorizing or requiring re-enlistment. St. 1893, c. 367, § 62, expressly provides that: "No soldier whose term of service remains unexpired in one organization shall enlist in another organization of the volunteer militia." The officers and men in question,

though relieved from duty, were still in the service of the Commonwealth in the organizations in which they had enlisted. They were not discharged from their service in such organizations when they entered the provisional militia. They were merely relieved from duty for the time being in their old companies, and, while so relieved from duty, were allowed to join the provisional companies. This the Commander-in-Chief had authority to permit. St. 1893, c. 367, § 149, expressly authorizes him to "make regulations for the government of the militia in accordance with existing laws." There is no law preventing the Commander-in-Chief from relieving a man from duty in one company and permitting him to serve in another. This does not transfer his membership to the new organization, but only his service. A member of the volunteer militia so entering the service of the provisional militia by permission of the Commander-in-Chief, during a time when he is relieved from duty, nevertheless may be ordered to report for duty in the original organization at any time.

The foregoing considerations dispose of the questions submitted in your letter of February 28, and I reply to them specifically as follows:—

First. — "Does a soldier of the active militia, relieved from duty because he is unable (for reasons) to go into the United States service with his command, forfeit his standing in the active militia by enlisting in the provisional militia, and can such soldier rejoin his company on its return from the Spanish war? Or must he be discharged from the provisional militia for re-enlistment in the active militia, and perhaps lose thereby his continuous service?"

Such a soldier does not forfeit his standing in the active militia by entering the provisional militia, but may be ordered by the Commander-in-Chief to rejoin his regular army on its return. His service in the provisional militia is subordinate to his duty in the active militia. It is not necessary as a prerequisite that he be discharged from the provisional militia.

Second. — "Would the commander of an organization be warranted in discharging a soldier relieved from duty because

he could not accompany his company into the United States service, because he enlisted in a provisional company, and, perhaps, thus deprive him of continuous service?"

This question must be answered in the negative.

Third. — "Can men of the provisional militia be transferred to the active militia upon their application and the consent of the company commanders from which and to which such transfer is desired, as is permissible with the active militia?"

For the reasons above stated, such men are subject to the orders of the Commander-in-Chief, and may be by him transferred to the active militia, either upon their application and the consent of the company commanders, or by the order of the Commander-in-Chief without such application.

FOREIGN BANKING CORPORATION — RIGHT TO FILE PAPERS WITH COMMISSIONER OF CORPORATIONS AND DO BUSINESS IN THIS COMMONWEALTH.

The Commissioner of Corporations may, under St. 1894, c. 381, accept the charter of a foreign corporation, if the kind of business for which it is organized is one the carrying on of which is permitted to domestic corporations under the laws of the Commonwealth; and it is not necessary that the statutes of the foreign jurisdiction creating it, and defining its powers, duties and liabilities, should be the same in all respects as the statutes of this Commonwealth relating to the same subject.

A foreign banking corporation may file its papers with the Commissioner of Corporations, although the State banking act was made practically inoperative by the imposition of a tax of ten per cent. upon the circulation of State banks by the federal government.

Your letter of March 11, enclosing a copy of the charter of the Bank of Nova Scotia, which has been presented for filing in your office under the provisions of St. 1884, c. 330, requires the opinion of the Attorney-General whether you are authorized to accept the paper, or are debarred under the provisions of St. 1894, c. 381.

To the Com-
missioner of
Corporations.
1899
March 30.

St. 1894, c. 381, provides in substance, in § 1, that it shall be unlawful for any corporation of another State or country to engage or continue in the Commonwealth in any kind of business the transaction of which by domestic corporations is not per-

mitted by the laws of the Commonwealth; and that the Commissioner of Corporations shall refuse to accept or file the charter of, or accept appointment as attorney for service for, any corporation doing business in this Commonwealth the transaction of which by domestic corporations is not then permitted by the laws of the Commonwealth.

The words "kind of business," as used in this statute, must be taken to signify the same general kind of business, and not that the statutes of the foreign jurisdiction creating it and defining its powers, duties and liabilities are the same, in all respects, as the statutes of this Commonwealth relating to the same subject. Under the latter construction, very few foreign corporations could be permitted to do business in the Commonwealth. It is not the duty, therefore, of the commissioner to inquire how far the powers, duties and liabilities of the foreign corporation are in all respects similar to those of domestic corporation of the same character, but only whether the kind of business for which it is organized is one the carrying on of which is permitted to domestic corporations under the laws of the Commonwealth.

The bank of Nova Scotia is subject to the banking act of Canada, enacted May 16, 1890. Section 64 provides as follows: "The bank may open branches, agencies and offices, and may engage in and carry on business as a dealer in gold and silver coin and bullion, and it may deal in, discount and lend money and make advances upon the security of, and may take as collateral security for any loan made by it, bills of exchange, promissory notes and other negotiable securities, or the stock, bonds, debentures and obligations of municipal and other corporations, whether secured by mortgage or otherwise, or Dominion, Provincial, British, foreign and other public securities, and it may engage in and carry on such business generally as appertains to the business of banking; but, except as authorized by this act, it shall not, either directly or indirectly, deal in the buying, or selling, or bartering of goods, wares and merchandise, or engage or be engaged in any trade or business

whatsoever; and it shall not, either directly or indirectly, purchase, or deal in, or lend money or make advances upon the security or pledge of, any share of its own capital stock, or of the capital stock of any bank; and it shall not, either directly or indirectly, lend money or make advances upon the security, mortgage or hypothecation of any land, tenements or immovable property, or of any ships or other vessels, or upon the security of any goods, wares and merchandise."

This enumeration makes it clear that the corporation in question is authorized to carry on a general banking business. This is a business the transaction of which by domestic corporations is permitted under the laws of the Commonwealth. Pub. Sts., c. 118, provides for the incorporation of State banks to do a general banking business, and under it corporations may be formed for that purpose. The statute has been practically inoperative, so far as it authorizes the emission of bank bills for circulation, since the enactment of the United States statute (Rev. Sts., U. S., § 3412) imposing a tax of ten per cent. upon the circulation of State banks. But, notwithstanding this fact, the Legislature has seen fit to continue the State bank law in force, and it cannot be said that the carrying on of a general banking business is not permitted by the laws of the Commonwealth.

I am of opinion, therefore, that it is your duty to accept the charter of the corporation in question. Whether a law should be permitted to continue upon our statute books which is inoperative so far as it relates to domestic corporations, but which may be taken advantage of by foreign corporations in the manner in which it has been by this corporation, is a question for the determination of the Legislature.

INSURANCE — SINGLE HAZARD — REINSURANCE.

The prohibition of St. 1894, c. 522, § 20, against insuring in a single hazard a larger sum than one-tenth of the net assets of the company, is not met by reinsuring such hazard so far as to bring the net amount of the risk within the prescribed limit.

Nor does it make any difference that the company taking the risk is one of a syndicate of companies, with the others of which it has contracts whereby each one of them becomes liable for its portion of the risk not exceeding the ten per cent. limit. Such a transaction is in fact reinsurance.

To the Insurance Commissioner.
1899
March 30.

St. 1894, c. 522, § 20, as amended by St. 1895, c. 59, § 1, provides that: "No insurance company shall insure in a single hazard a larger sum than one-tenth of its net assets." To this provision there are certain exceptions, one of which is contained in the same section, and another in St. 1898, c. 537.

Your letter of March 23 requires the opinion of the Attorney-General upon two questions touching the construction of the foregoing statute, to wit: —

First. — "Whether a company, except as provided in the exceptions above noted, violates a statute when it takes an amount in excess of one-tenth of its net assets in a single hazard, if it immediately reinsures such portion of the risk that it does not retain for itself an amount in excess of the limit prescribed by the law."

This inquiry is fully answered by Attorney-General Pillsbury in an opinion submitted to your department, dated July 29, 1891 (1 Op. Atty.-Gen. 25), in which he advised the commissioner that the prohibition against insuring in a single hazard a larger sum than one-tenth of the net assets of the company is not met by reinsuring such hazard so far as to bring the net amount of the risk within the prescribed limit.

I see no reason to doubt the soundness of that opinion.

Second. — "Whether a company violates the statute in question when it takes an amount in excess of the ten per cent. limit, if at that time it has a contract with a syndicate of companies, in which each company agrees with each of the others to become liable for an equal part of the amount insured from the moment it is bound by either of the companies."

It is stated in your letter, in explanation of this question, that the original company issues its policy for the whole amount of insurance, and that the share of each member of the syndicate in the liability would not exceed the ten per cent. limit.

The reasons which lead to the conclusion that the prohibition of the statute is not met by reinsurance govern this inquiry. It is immaterial under what form of contract the company writing the policy arranges with other companies to share its liability. The transaction is in fact reinsurance. The company which writes the contract is alone liable to the insured. He has no contractual relations with the other companies in the syndicate.

MASSACHUSETTS REFORMATORY — AUTHORITY OF SUPERINTENDENT TO CONTRACT WITH CONCORD FOR WATER SUPPLY — NATURE OF A RESOLVE OF THE LEGISLATURE.

The authority of the superintendent of the Massachusetts Reformatory to contract with the town of Concord to supply the reformatory with water is limited, under the provisions of Res. 1894, c. 62, to the execution of a single contract.

I am unable to answer satisfactorily the first inquiry in your letter of the 23d without further information as to what took place at the termination of the contract referred to in St. 1884, c. 201, § 11.

To the Commissioners of Prisons.
1899
March 30.

Replying to your second inquiry, I beg to say that in my opinion the authority of the superintendent of the Massachusetts Reformatory to contract with the town of Concord to supply the reformatory with water, under the provisions of Res. 1894, c. 62, was exhausted when he made a contract therefor. Resolves are distinguished from acts by being temporary in their nature. A bill conferring general authority upon the superintendent to contract for water supply would give him authority to make new contracts or to renew existing contracts. It is otherwise with a resolve. There being nothing in the resolve to indicate that the authority is continuing, it must be taken to give authority only for the execution of a single contract, and does not authorize the superintendent to make a new contract at the expiration thereof.

BOSTON GAS COMPANIES — CHARTERS SUBJECT TO AMENDMENT,
ALTERATION AND REPEAL — CONSOLIDATION — CONSTITUTIONAL LAW.

An act which should authorize the gas companies of Boston, whose charters are subject to amendment, alteration or repeal, to consolidate, and provide that, unless they did consolidate before a certain date, their charters should be repealed on that date, would be constitutional.

It is doubtful whether the Legislature may delegate to the courts the authority to annul the charters, in case the corporations should not consolidate within the prescribed time.

To the House
of Represent-
atives.
1899
April 26.

I have the honor to acknowledge the receipt of the order of the House of Representatives, adopted April 12, 1899, requesting my opinion upon the following questions, to wit: —

First. — “Whether the provisions of § 11 of the proposed act for the consolidation of certain gas companies in the city of Boston, submitted in the fourteenth annual report of the Board of Gas and Electric Light Commissioners (Pub. Doc. No. 35), are constitutional, and can be enforced in law or equity.”

Second. — “Whether a law requiring any two or more gas companies to consolidate without the consent of such companies can be enforced in law or equity.”

The corporations affected by the proposed act are the Boston Gas Light Company, the Brookline Gas Light Company, the Bay State Gas Company, the Roxbury Gas Light Company, the South Boston Gas Light Company, the Dorchester Gas Light Company, the Jamaica Plain Gas Light Company and the Massachusetts Pipe Line Gas Company.

All these corporations, excepting the Boston Gas Light Company, were incorporated subsequent to the year 1831, and are subject to the provisions of Pub. Sts., c. 105, § 3, which provides that: “Every act of incorporation passed after the eleventh day of March in the year eighteen hundred and thirty-one shall be subject to amendment, alteration or repeal at the pleasure of the General Court.” The Boston Gas Light Company was incorporated by St. 1822, c. 41; and there is no provision in the charter which, in terms, makes it subject to amendment or repeal at the pleasure of the Legislature, nor any provision

limiting the duration of the charter. But, by St. 1809, c. 65, which was "An act defining the general powers and duties of manufacturing corporations," it was provided (§ 7) that "the legislature may from time to time, upon due notice to any corporation, make further provisions, and regulations for the management of the business of the corporation, and for the government thereof, or wholly to repeal any act, or part thereof, establishing any corporation, as shall be deemed expedient." This act was in force when the Boston Gas Light Company was incorporated, and, in my opinion, is to be taken as limiting the rights conferred by its charter. The charters of all the corporations affected by the proposed act are subject, therefore, to amendment, alteration or repeal at the pleasure of the Legislature.

It is this power of control over its corporations which is invoked in the proposed act. The act provides in § 1 that the corporations named may unite and consolidate into one company, in the manner and upon the terms and conditions thereafter set forth. By § 2 it is provided that the terms and conditions shall be agreed upon by the directors of each and all the corporations, subject to the approval of a majority of the stockholders of the respective corporations and of the Board of Gas and Electric Light Commissioners. The agreement so to be executed shall determine the amount of the capital stock, bonds and coupon notes to be issued by the new corporation, and shall provide for the conveyance of all the real and personal estate of the constituent corporations to the new corporation; and also the proportion in which the shares, bonds and coupon notes of the new corporation shall be distributed among the shareholders and creditors of the constituent corporations. The act further provides for the organization of the new corporation within thirty days after the execution and approval of the agreement provided for in § 2, and that upon the completion of such organization the corporate existence of the respective constituent corporations shall continue only for the purpose of winding up its business; and that the new corporation shall have all the franchises and rights, and be subject to all the duties and restrictions of each of the constituent corporations, and

of all general laws applicable to gas companies. Thus far the act appears to be permissive. Section 11, however, being the section referred to in the resolution of your honorable body, provides as follows: "If at the expiration of — months from the passage of this act, any of the companies named in section one shall have failed or neglected to execute and complete the agreement mentioned in section two in the manner therein described, the board of gas and electric light commissioners shall proceed to determine the terms and conditions upon which such companies shall be included in the consolidation provided by this act, and, for the purpose of determining said terms and conditions, may notify such companies to appear before said board, to be heard relative thereto. If such companies or any of them shall thereafter accept the terms and conditions determined by the board as aforesaid, the companies so accepting shall thereafter be subject to the provisions of this act in all respects as if the terms and conditions had been agreed to in the manner provided in section two. If such companies or any of them shall within — days after notice thereof fail to accept the terms and conditions so determined, the supreme judicial court shall, upon petition of said board, declare the charter of the companies so failing to be revoked and annulled, and may issue such further orders and decrees relative to the property and business of said companies as said board may deem necessary and advisable."

There can be no doubt that, if the legislative body has the right to repeal the charter of a corporation, it may provide that the repeal of the charter shall be conditional upon the happening of some future event. St. 1893, c. 474, is an example of such legislation. By that statute it was provided that the charter of the Bay State Gas Company should be revoked and annulled on the first day of December following the passage of the act, unless the corporation should, prior to said first day of December, procure the cancellation and discharge of a certain obligation issued by the company and outstanding at the date of the passage of the act.

A similar statute, enacted by the Legislature of Connecticut, has been sustained by the Supreme Court of that State. *Lothrop*

v. *Stedman*, 42 Conn. 583. The statute in that case provided that the charter of a corporation should be repealed on a given date, unless before that time the corporation should receive a certificate that the deficiency in its assets had been supplied, with provision for the determination of any disagreement as to the amount of its assets by the Supreme Court. Judge Shipman, in delivering the opinion of the court, said: "A valid statute may be passed to take effect upon the happening of some future event. Certain, or uncertain, it is a law *in presenti*, to take effect *in futuro*. The event, or change of circumstances, must be such as, in the judgment of the Legislature, affects the question of the expediency of the law. The Legislature in effect declares the law inexpedient if the event should not happen, expedient if it should happen. They appeal to nobody to judge of its expediency."

These considerations, in my judgment, are decisive of the general inquiry submitted to me. I observe, however, that, instead of enacting in express terms that the charter shall be repealed, the section provides that the Supreme Judicial Court "shall, upon petition of said board, declare the charters of the companies so failing to be revoked and annulled." I doubt whether this language is sufficient. The Legislature may not, in my opinion, delegate to the court authority to annul the charter of a corporation for failure to perform the acts authorized by the proposed statute. The section should be amended so that the repeal is the act of the Legislature, and not of the court. It was probably intended by the framer to provide for a determination by the court of the existence of the facts upon the happening of which the charters are to be repealed. This the Legislature may do; but the repeal itself must be enacted by the Legislature in express terms.

I therefore answer the questions of your honorable body as follows:—

First.—If the proposed section be so amended as to contain an express provision that the charters of the companies enumerated shall be repealed upon the contingency set forth, such a provision will be constitutional, and can be enforced.

Second. — A law requiring two or more gas companies to consolidate, without the consent of such companies, is not within the constitutional power of the Legislature, but a law providing that the charters of corporations shall be repealed unless they see fit to consolidate, will be constitutional and can be enforced.

TOPOGRAPHICAL SURVEY COMMISSION — BOUNDARY LINE BETWEEN MASSACHUSETTS AND RHODE ISLAND — PRESCRIPTION.

The Topographical Survey Commission have no authority, under Res. 1897, c. 88, to change any portion of the boundary line between Massachusetts and Rhode Island, as fixed by a decree of the Supreme Court of the United States, in compliance with the wishes of certain adjacent inhabitants, who supposed they lived in Rhode Island, but who find upon the marking of the line that they live in Massachusetts.

Quære: Whether Rhode Island, by exercising jurisdiction over a portion of Massachusetts territory since the decree, and in face of the injunction therein, could gain any prescriptive right of jurisdiction over such territory.

To the Topographical
Survey Commission.
1899
April 29.

Your letter of April 3 states the following facts: —

The Topographical Survey Commissioners, acting with a special commission appointed for the purpose by the State of Rhode Island, were directed by Res. 1897, c. 88, to re-mark a portion of the boundary line between the two States, and to substitute in place of certain indeterminate contour lines a series of straight lines. This work was carried out by the two commissioners, and stone bounds were set, marking the line agreed upon throughout its length. After this marking was completed, it was brought to the attention of the commissioners that certain houses near the boundary line between two portions thereof were on the Massachusetts side of the line, although their owners had previously supposed that they were on the Rhode Island side.

So much of the resolve as is material to the present question is in the following words, to wit: "*Resolved*, That the commissioners on the topographical survey and map of Massachusetts are hereby authorized and directed, acting with any officer or agent who may be authorized or appointed for a like purpose

by the state of Rhode Island and Providence Plantations, to locate, define and mark by appropriate monuments a series of straight lines along the jurisdictional line between the territory of the Commonwealth of Massachusetts and the state of Rhode Island and Providence Plantations, from the so-called 'Burnt Swamp Corner,' in Wrentham, southerly to the sea, said straight lines to follow as near as may be the line established by a decree of the supreme court of the United States, dated the sixteenth day of December in the year eighteen hundred and sixty-one."

Your letter further states that the marking of the line as defined by the decree of the United States Supreme Court in 1861 was very imperfect; that at the places referred to there were no marks from which the inhabitants could determine the exact location of the lines without a comparatively expensive survey; and that certain inhabitants of Rhode Island have purchased land and erected houses there since 1861, but without taking measures to determine the exact location of the line definitely; and that, as their previous political relations had been with Rhode Island, and as the public charges of the Rhode Island town were less than those of the town in Massachusetts, they had made no effort to secure a change, and still wish to continue their present affiliations. The Rhode Island town has also extended its water pipe to a point east of the line, and has set a fire hydrant there, and maintains the highway as far as the water pipe extends. Your letter further states that, in view of these facts, the Rhode Island commissioners suggest that such action be taken as will modify the line at these points to conform to the wishes of such inhabitants, and that the line decreed by the Supreme Court in 1861 has been modified by the action of these people and the authorities of the two towns.

Your letter requests the Attorney-General to advise the commission as to its authority in the matter, and upon the question whether any claim of adverse possession is valid to the extent of modifying the line laid down by the Supreme Court.

It appears that the line fixed by the decree of the Supreme Court in the locality in question was a straight line between two fixed points, and that the territory in question is upon the Massa-

chusetts side of such straight line. By that decree the State of Rhode Island was perpetually enjoined and restrained from exercising jurisdiction eastwardly of said line, and the State of Massachusetts was likewise enjoined and restrained from exercising jurisdiction westwardly of said line. Permanent stone monuments were ordered by the decree to be erected at the termini of these straight lines, and the decree in that respect has been complied with.

I do not deem it necessary, for the purpose of answering your question, to determine whether any rule of prescription is applicable between two States, to the extent that property within the borders of one State can be acquired by the prescribing State. The question is discussed to some extent in *Rhode Island v. Massachusetts*, 15 Peters, 233, 273. Although that case determined only that the ordinary rule of prescription as between individuals does not apply to sovereign States, and leaves it somewhat uncertain as to whether there can be any such thing as obtaining territory by prescription in such cases, I think the reasoning adopted by the court leads to the conclusion that it would be difficult for a State to establish a claim to territory in such a way. Moreover, it may be considered as at least doubtful whether title by prescription could be acquired under any circumstances, in the face of a perpetual injunction of the court binding upon the parties to the controversy.

However this may be, I am clearly of the opinion that the resolve under which you and the other commissioners act does not confer upon you jurisdiction to pass upon any such question. The decree of the Supreme Court of the United States fixed the line. That being so, your only duty is to determine the line so fixed, and to mark it by suitable bounds. If, for any reasons, the line in the locality in question should be changed to conform to the wishes of the people affected, action to that end should be taken by the States themselves.

Your duties are, in some though not in all respects, analogous to those of selectmen of towns when perambulating lines between towns, whether in this State or upon the borders of another State, under the provisions of Pub. Sts., c. 27, §§ 3 and 6. It is

well settled that in the performance of those duties selectmen have no authority to change the boundaries or to adjudicate upon the limits of towns, but only to ascertain existing lines. *Commonwealth v. Heffron*, 102 Mass. 148. How far you might be authorized to determine a line left in doubt under the decree of the court, it is unnecessary to consider. The facts submitted to me show that there is and can be no doubt as to the line intended in the decree.

SAVINGS BANKS — AUTHORIZED INVESTMENTS — BONDS OF THE
CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY.

In determining whether the bonds of the Chicago, Burlington & Quincy Railroad Company are investments which savings banks are authorized to take by St. 1899, c. 269, payments to sinking funds and interest upon sinking funds are to be considered as earnings of the company.

Your letters of May 3 and May 13 require the opinion of the Attorney-General upon the question whether the bonds of the Chicago, Burlington & Quincy Railroad Company are, on the facts stated in your letters, investments which savings banks are authorized to take under the acts of the Legislature passed this year.

To the Com-
missioners of
Savings
Banks.
1899
May 17.

The statute referred to (St. 1899, c. 269) provides that, in addition to the investments already authorized, savings banks and institutions for savings may invest their deposits and the income derived therefrom in the bonds of certain railroads specified in the act, including among them the Chicago, Burlington & Quincy Railroad Company; "*provided, . . . that each railroad whose bonds are hereby authorized for investment shall have earned and paid regular dividends on all its issues of capital stock of not less than four per cent. each fiscal year for the ten years next preceding such investment.*"

It appears from your letters that the only doubt that exists is in relation to the net income of the railroad in question for the year 1896. The statement for that year, as submitted in your letter of May 13, is as follows: —

OPINIONS OF THE ATTORNEY-GENERAL.

Net earnings from operating, ...	\$11,515,984 68
Miscellaneous income, ...	358,740 05
Land sales, ...	31,583 35
Income from securities in sinking funds, ...	478,153 78
	\$12,384,461 86
Payments:—	
Interest on bonds, ...	\$8,252,778 08
Rent of tracks, etc., ...	409,275 15
	8,662,053 23
	\$3,722,408 63
Dividends, ...	3,280,111 00
Surplus, ...	\$442,297 63

Although this statement shows a surplus of \$442,297.63, it includes income from securities in sinking funds to the amount of \$478,153.78, and it does not include payments by the corporation to its sinking fund during the year from earnings of the road to the amount of \$777,784.56. The report of the directors of the corporation for the year 1896 includes the payments into the sinking fund among the expenses of the road, and omits the income from sinking fund securities, and thus shows an apparent deficit after the payment of a dividend of four per cent.

The precise question proposed, therefore, is whether payments to sinking funds should be charged to income, and interest earned on sinking funds held by the company should be added thereto. If such payments are to be charged to income, and the interest upon sinking funds is not to be included in the income, then there is a deficit, and the company has not brought itself within the limits of the proviso above quoted; otherwise, it has.

A railroad may be said to have earned its dividend when its income from its property and business exceeds the amount of its fixed charges, including operating expenses and interest on its debt, by more than the amount of the dividend. The payment, in whole or in part, by the company of a pre-existing debt is no part of the expenses which are to be deducted in determining the question of its earnings for any given year. The company is neither better nor worse off by the payment of its debts or any portion of them. It might well use all its gross earnings in any given year for the payment of maturing bonds, and still be war-

ranted in borrowing money temporarily to pay a dividend to its stockholders. It would be as well able to pay a dividend as it would have been if it had not paid its debts, but had used its income for the purposes of dividend. The debts of a railroad corporation represent, ordinarily, and perhaps in all cases, that portion of the cost of the road which is not paid for. If a road does not earn dividends until the expense of the cost of the road is paid, there is probably not a road in the country which could properly be said to earn the dividends it pays from year to year. For example, if a road were built wholly upon credit, and earned in the first five years enough to pay for the cost of the road over and above its operating expenses, it would make no difference whether the amount so earned should be appropriated wholly to pay the debt, or in part to pay the debt and the balance to pay dividends. In either case it earned enough to pay dividends. In other words, the net earnings, whether of a railroad or of any other corporation, or even of an individual, are none the less real, whether invested in the payment of debts or used for other purposes. If, in the case of a corporation, they are used to pay dividends and not debts, they are still earned.

I understand this principle to be universally recognized as sound. It follows that the same rule should apply to payments to sinking funds. A sinking fund is merely a sum of money set aside to pay a debt. It remains the property of the company, and, although it may be pledged for the payment of the debt, as I understand to be the case here, payments to such fund do not weaken the earning capacity of the road, any more than would the payment of the debt itself. If, instead of being appropriated to sinking funds, the amount had been used for the payment of a portion of its bonds, the result would be the same, and would bring the case within the doctrine above stated.

So, too, with earnings from sinking funds. Such earnings are from the property of the road, and are no less earnings than those which accrue from other parts of its plant. They belong to the credit side of the earning account, and, whether added to the sinking fund itself, or used to pay interest on a debt (as I understand may be the case here), are a part of the

income of the road, and are to be considered in ascertaining the total amount of its net earnings.

I am of opinion, therefore, upon the facts stated, that the Chicago, Burlington & Quincy Railroad Company earned and paid a regular dividend of four per cent. in the year 1896, within the meaning of the statute referred to. I am informed that no question arises upon any other years; and it follows that its bonds are a lawful investment under the existing law for savings banks and institutions for savings.

STATE BOARD OF HEALTH — AUTHORITY TO EXTEND TIME ORIGINALLY FIXED FOR DISCHARGE OF SEWAGE OF PITTSFIELD INTO HOUSATONIC RIVER.

The State Board of Health did not exhaust its authority, under St. 1890, c. 357, § 1, by approving a general plan for the construction of a system of sewerage for the city of Pittsfield, and may entertain a petition by the city for an extension of the time originally fixed for the discharge of sewage into the Housatonic River.

To the State
Board of
Health.
1899
May 18.

The city of Pittsfield has applied to the State Board of Health for an extension of time during which sewage may be discharged into the Housatonic River, and the State Board of Health requests the opinion of the Attorney-General upon the question whether it has a right to make such extension.

St. 1890, c. 357, § 1, provides: "The city of Pittsfield, upon the organization of its municipal government, is hereby authorized, through a board of commissioners to be elected as herein-after provided, to lay out, construct and maintain a system or systems of sewerage and sewage disposal for said city in accordance with any general plans which have been or may be approved by the state board of health." On May 12, 1891, under the authority of this act, the Board of Health approved a general plan for a system of sewerage and sewage disposal, which provided for the permanent disposition of the sewage by intermittent filtration through certain areas of upland, and allowed the temporary discharge of the sewage into the Housatonic River during the construction of the works; but provided that such discharge should not continue after June 1, 1900. The city now desires to continue the discharge after that date.

The question upon which an opinion is requested is, whether the Board of Health, by approving a general plan once, providing that the temporary discharge into the river should not continue after 1900, thereby exhausted its authority, so that it cannot now entertain a petition by the city for an extension of the time during which sewage may be discharged into the river.

If the Board had the right to authorize for any period of time the discharge of sewage into the Housatonic River, I have no doubt of its authority to authorize an extension of the time so limited. The statute gives to the Board authority to approve the general plans for the construction of a sewerage system in the city of Pittsfield. That authority is not, in my judgment, exhausted by a single act of approval. Modifications of the general plan may be shown to be necessary; and I cannot believe it to be the intention of the act that the State Board, having once approved a plan submitted to it, cannot for good reasons approve a modification of the original plan. The act does not contemplate a single act of jurisdiction upon the subject, whereby the authority of the Board is exhausted, but a general supervision, extending as far as may be necessary to the accomplishment of the work proposed.

If it may act, from time to time, in relation to the approval of general plans, it may, in my judgment, also act to extend the time approved for the temporary discharge of sewage made necessary by the execution of such plans.

PILOTS OF BOSTON HARBOR — REGULATION TO COMBINE PILOT BOATS AND PILOTAGE FEES.

The regulations for the pilotage of Boston harbor, annexed to St. 1862, c. 176, and expressly continued in force by Pub. Sts., c. 70, § 40, forbid the commissioners of pilots to combine the pilot boats and earnings, so that all the Boston pilots will receive the same amount.

Your letter of March 15 requires the opinion of the Attorney-General upon the question whether your Board has the right "to combine the pilot boats and earnings, so that all the Boston pilots will each receive the same amount."

To the Pilot
Commissioners.
1899
May 25.

The regulations for the pilotage of Boston harbor, annexed to St. 1862, c. 176, are expressly continued in force under the provisions of Pub. Sts., c. 70, § 40. Among those regulations is the following: "Any commissioned pilot for the harbor of Boston, that may be found mating or combining, or in any way interested with any other pilot in the business of pilotage, except with those pilots belonging to the same boat with himself, shall be liable to forfeit his commission. The obvious purpose of this regulation, in connection with the statutes (Pub. Sts., c. 70, §§ 25, 26 and 27) which make the pilotage fees payable to the first pilot offering his services, is to secure the vigilance and attention to duty which comes of competition and rivalry. It would be otherwise if a combination were made by which pilots were assured of their fees, whether they were diligent or not.

Pilots, therefore, have no right to combine their earnings; much less has your Board, charged with the duty of enforcing the law, the right to establish by regulation what would amount practically to a repeal of the provisions I have referred to.

PUBLIC RECORDS — PRESERVATION OF TOWN RECORDS — DUTY OF SELECTMEN.

The duty imposed upon selectmen by St. 1897, c. 439, § 10, to provide fire-proof vaults for the public records of the town, is not conditioned upon action or appropriation by the town, and such officers may incur the expense of compliance with the law, and the city or town is obliged to reimburse them.

To the Com-
missioner of
Public
Records.
1899
May 26.

The duty resting upon selectmen by St. 1897, c. 439, § 10, to "provide and maintain fireproof rooms, safes and vaults" for the keeping of the public records of their towns, is not conditioned upon appropriation for that purpose by the town or action thereto by the town in a town meeting. It rests upon the town officers. I have heretofore advised you, in a letter dated September 21, 1897 (1 Op. Atty.-Gen. 484), that a person upon whom such a duty rests may incur the expense of compliance with the law, and that the city or town is obliged to reimburse him therefor. The same principle applies in the case submitted.

If you are unable to enforce the provisions of the statutes relating to the preservation of public records, it is your duty to report the matter to the Attorney-General, with the facts, that he may take such action as he thinks proper in the premises.

STATE HIGHWAYS — EXPENSE OF REPAIRING WHEN OCCUPIED
BY STREET RAILWAY TRACKS.

St. 1898, c. 578, relieves street railway companies from the duty formerly imposed upon them of keeping in repair a portion of the streets in which their tracks are located, and the Commonwealth must bear all the expense of repairing State highways occupied by street railway tracks, although the towns in which such highways are receive the tax which the statute of 1898 imposes upon the street railway companies in substitution for the duty of keeping in repair a portion of the streets occupied by their tracks.

Your letter of April 17 requires the opinion of the Attorney-General upon the following question: "If repairs are necessary on or beside a street railway located on a State highway, on that part of the road constructed by the street railway company, is the street railway company, the town in which the highway lies, or this commission, obliged to bear the expense of making such repairs?"

To the State
Highway
Commission.
1899
May 26.

The inquiry discloses an apparent omission in the recent legislation touching street railways, which your commission may deem it proper to call to the attention of the Legislature. St. 1898, c. 578, radically changed the duties and obligations of street railway companies in reference to the repair of the streets occupied by their tracks. Under the prior law (Pub. Sts., c. 113) it was the duty of the street railway company to keep in repair the portion of the highway between its tracks, and in unpaved streets a space of eighteen inches on each side of the portion occupied by its tracks. But by the later statute (St. 1898, c. 578, § 26) street railway companies are relieved from the duty of keeping in repair any portion of the streets occupied by their tracks. In substitution therefor, provision is made in §§ 7, 8, 9 and 10 for the payment of an annual tax by street railway companies to the cities and towns in which their tracks are situated. This tax is to be applied by such cities and towns (§ 10) "towards

the construction, repair and maintenance of the public ways, and removal of snow therefrom, within such cities and towns."

The provisions of the statute of 1898, however, make no reference to State highways. The statutes relating to such ways impose upon the Commonwealth the whole duty of keeping them in repair. A State highway having been laid out and constructed by the State Highway Commission, it is to be "kept in good repair and condition as a highway by said commission at the expense of the Commonwealth." St. 1897, c. 355, § 1. Inasmuch as the tax imposed under the provisions of the statute of 1898 is for the purpose of keeping the way occupied by a railway company in repair, it would seem equitable that so much of the tax as represents those of the ways in a municipality which are State highways should be paid to the Commonwealth.

The statutes do not so provide, however. On the contrary, as they stand, I am constrained to advise you that the towns may receive the whole tax, while the duty of repairing State highways rests upon the Commonwealth, without right of reimbursement either from the municipality or from the street railway company.

ANALYSIS OF MILK SAMPLES — PERSON TO BE DEALT WITH — ATTORNEY-GENERAL.

The word "analysis," as used in St. 1899, c. 169, § 1, is to be interpreted as signifying the result of the analysis.

That statute requires only that the result of whatever, if any, analysis is made by the authority of the Dairy Bureau should be communicated to the person from whom the sample is taken.

The person to be dealt with by the Dairy Bureau is the person who would be legally responsible in the event of prosecution.

The Attorney-General will not advise a State Board what will be the effect upon proceedings in court instituted by it of its compliance or non-compliance with certain provisions of law. It is the business of the Board to comply with the law.

To the acting
executive
officer of the
Dairy Bureau
of the State
Board of
Agriculture.
1899
June 1.

Your letter of May 26 requires my opinion upon certain questions relating to the construction of St. 1899, c. 169, § 1, which is as follows: "Whenever the state board of health, dairy bureau, or other state or city authority obtains a sample of milk for inspection, by taking, purchase or otherwise, the analysis of said

sample shall, within ten days of the procurement thereof, be sent to the person from whom the sample was obtained."

The questions submitted are as follows:—

First. — "An analysis is a process or an operation, and cannot be sent to any one by mail, messenger or otherwise. It was doubtless the intent of the Legislature to order the sending of the statement of the *result* of the analysis. Is the law null and void by reason of requiring an impossibility, or shall we comply with what we assume to be its evident intent?"

Statutes are to be construed, if possible, in such a way as to make them intelligible and practicable. It was obviously not the intention of the Legislature to require the operation itself to be sent to the person from whom the sample was obtained. Such a construction would be absurd. The word "analysis," as used in the section, is to be interpreted as signifying the result of the analysis.

Your letter further states that samples of milk taken by your inspectors "are subjected to preliminary tests for the purpose of weeding out the samples which are above suspicion, and stopping further expense so far as they are concerned," and that suspicious samples go to the chemist, in order that the chemist may do various things according to circumstances; that "he may make no analysis at all, but test the milk for the presence of preservatives;" or "he may merely evaporate the water, to ascertain the percentage of total solids;" or in some cases he may make further determination of the amount of fat and of ash; but that in no case is a complete analysis made.

Upon these facts you inquire (second and third) whether the law requires you to change your practice, and make an analysis of every sample that comes into your possession, or will the requirements of the law be met by a partial analysis of the sample, — that is, so much of an analysis as you would make if enforcing the laws against adulterated or low-standard milk.

The law does not impose upon you the duty of complete analysis. It only requires you to report to the person from whom you took the sample the result of whatever, if any, analysis is made by authority of your Board.

A further question contained in your letter is as follows: —

Fourth. — “Are the words ‘the person from whom the sample was taken’ to be construed literally, said person being frequently a driver, salesman, clerk or waiter, or does the law mean the person whom we would hold legally responsible in the event of prosecution, — the proprietor or manager of the business?”

I am of the opinion that the intention of the law is carried out if you deal with the person who would be legally responsible in the event of prosecution.

Your fifth question does not, in my judgment, call for a reply. It calls for my opinion upon the effect upon proceedings in court of compliance or non-compliance with certain provisions of the law. It is the business of the Board to comply with the law. It is the business of the courts to deal with the cases that are presented. How far compliance or non-compliance with the law may affect the decision of the courts in prosecutions instituted by you is a matter for judicial determination.

RETIRED JUSTICE OF SUPREME COURT — SALARY.

It was not the intention of the Legislature to terminate, by St. 1899, c. 310, the salary of a retired justice of the Supreme Court, to which he was entitled by St. 1885, c. 162. The act of 1899 is to be taken as a continuance, and not as a repeal, of the older statute.

Such salary shall be certified as payable under the provisions of the statute of 1899.

To the
Auditor.
1899
June 2.

The opinion of the Attorney-General is required upon the question whether further legislation is necessary, in view of the following facts: —

St. 1885, c. 162, provides that: “Any justice of the supreme judicial court . . . who shall resign his office, shall during the residue of his natural life receive three-fourths of the salary which was by law payable to him at the time of his resignation.”

By St. 1887, c. 420, a similar provision was made for the justices of the Superior Court, excepting that the amount to be paid annually upon their retirement should be one-half of the salary payable at the time of such retirement.

A justice of the Supreme Judicial Court retired while the act first above quoted (St. 1885, c. 162) was in force, and became entitled to and has hitherto received the annual salary provided for in that act.

An act of the present Legislature (St. 1899, c. 310) provides in the first section that: "A justice of the supreme judicial court or of the superior court who shall resign his office, . . . shall, during the remainder of his natural life, receive an amount equal to three-fourths of the salary by law payable to him at the time of his resignation." The effect of this section is to increase the amount payable to the justices of the Superior Court, and to continue the existing provisions for justices of the Supreme Judicial Court. Section 3 of this act expressly repeals the former acts, including the one under which the retired justice in question has hitherto been paid.

Your question is, whether the repealing clause of the act of this year has taken away the authority for the payment of the salary to the retired justice who has hitherto been receiving a salary, the law authorizing such salary having been expressly repealed.

"It is a familiar rule of construction, that when statutes are repealed by acts which substantially retain the provisions of the old laws, the latter are held not to have been destroyed or interrupted in their binding force. 'In practical operation and effect they are rather to be considered as a continuance and modification of old laws, than as an abrogation of those old, and the re-enactment of new ones.' Shaw, C.J., in *Wright v. Oakly*, 5 Met. 400, 406." *United Hebrew Benevolent Association v. Benshimol*, 130 Mass. 325, 327; Endlich on the Interpretation of Statutes, § 490.

The rule thus stated applies to the present case. It was not the intention of the Legislature, even if it were within its constitutional power (which may be questioned), to terminate the salary of the retired justice who had become entitled thereto under the law repealed. The act of this year is to be taken as a continuance, and not as a repeal, of the older statute.

The salary should be certified by your office as payable under the provisions of the statute of this year.

LABOR — CORPORATION — COERCION OF EMPLOYEE INTO CONTRACT NOT TO JOIN LABOR ORGANIZATION.

A requirement by a corporation that its employees shall agree, as a condition of employment, not to take any action, secretly or otherwise, either by themselves or by joining with others, with the intent to interfere with the continuous running of the corporation's business, is not in violation of St. 1894, c. 508, § 3, providing that no corporation shall coerce or compel any person into an agreement not to join any labor organization, as a condition to securing employment or continuing in the employment of such corporation.

To the Chief
of the Massachusetts
District Police.
1899
June 18.

St. 1894, c. 508, § 3, so far as the same is material to the question submitted in your letter of June 9, is as follows: "No . . . corporation . . . shall coerce or compel any person or persons into any agreement, either written or verbal, not to join or become a member of any labor organization, as a condition of such person or persons securing employment or continuing in the employment of any such . . . corporation." In the case stated by you in your letter a certain corporation has caused notice to be posted, containing, among other things, the following: —

The proprietors of this factory hereby announce to all who desire to contract for the PERFORMANCE of any labor therein, that after prices, terms and conditions of said labor are mutually agreed to, each shall consent in writing to the following: —

Having agreed to labor in the ——— factory at ——— until November 19, 1899, upon certain prices and terms, and with full knowledge of conditions existing in factory, I hereby further agree that I will not, until November 19, 1899, either by myself or joining with others, take any action, secretly or otherwise, with the intent to interfere with the continuous running of the factory; and that I will not recognize any authority which makes requests or gives orders contrary to the letter and spirit of this agreement.

I am of opinion that this notice does not constitute a violation of the statute above quoted. It may, perhaps, be in violation of the intent of the framers of the act; but penal statutes are to be construed strictly, and their language is not to be extended by implication. The prohibition of the statute is against coercing a person into agreeing not to join a labor organization. The notice provides that the person accepting employment shall not take any action which shall interfere with the running of the fac-

tory, and that he will not recognize any authority which makes requests or gives orders contrary to such agreement. Even if it be true that labor organizations may see fit at times to attempt interference with the continuous running of the business of employers, the notice is, nevertheless, not in terms within the prohibition of the statute. An agreement not to do a specified thing is not, in construing a penal statute, equivalent to an agreement not to join an organization which may perhaps seek, as such an organization, to do the thing the employee, by accepting the employment, has agreed not to do.

FOREIGN CORPORATION — MANUFACTURING AND SELLING INTOXICATING LIQUORS — ADMISSION TO DO BUSINESS IN THIS COMMONWEALTH.

A domestic corporation may, if duly licensed, sell intoxicating liquors within the Commonwealth. A foreign corporation, one of the purposes of which is the sale of intoxicating liquors, cannot be said to be carrying on a business the transaction of which by domestic corporations is forbidden in this Commonwealth; and it is the duty of the Commissioner of Corporations to accept and file the papers of such corporation.

Your letter of June 2 states that a foreign corporation, organized for the purpose of manufacturing and selling intoxicating liquors, has applied for permission to file its papers with your office, under the provisions of St. 1884, c. 330. The opinion of the Attorney-General is requested upon the question whether it is the duty of the commissioner to refuse to file such papers, as being prohibited by St. 1894, c. 381.

To the Commissioner of
Corporations.
1899
June 16.

The latter statute provides as follows: "It shall be unlawful for any corporation, association or organization of another state or country, except life insurance companies as provided in chapter two hundred and fourteen of the acts of the year eighteen hundred and eighty-seven, to engage or continue in the Commonwealth in any kind of business the transaction of which by domestic corporations is not permitted by the laws of the Commonwealth. The commissioner of corporations . . . shall refuse to accept or file the charter, financial statement or other papers, or accept appointment as attorney for service for any corporation,

association or other organization doing a business in this Commonwealth, the transaction of which by domestic corporations is not then permitted by the laws of the Commonwealth."

In a letter to you dated January 2, 1896 (1 Op. Atty.-Gen. 304), I stated it as my opinion that a corporation organized under the general laws may not sell intoxicating liquors in this Commonwealth. In the recent case, however, of *Enterprise Brewing Co. v. Grime*, 173 Mass. 252, the Supreme Judicial Court has determined otherwise. The corporation in question in that case was formed for the purpose of manufacturing and selling beer, ale and malt liquors. But the opinion of the court proceeds upon the ground that a license to sell intoxicating liquor may be lawfully granted, under the provisions of our statutes, to a corporation. Yielding to the authority of that decision, I am constrained, therefore, to advise you that a domestic corporation may, if duly licensed, sell intoxicating liquors within the Commonwealth. That being so, and it appearing that one of the purposes of the foreign corporation in question is to sell intoxicating liquors, it cannot be said to be carrying on a business the transaction of which by domestic corporations is forbidden in this Commonwealth. If other provisions of the law are duly complied with, it is your duty to file the papers of the corporation in question.

METROPOLITAN PARK COMMISSION — AUTHORITY TO ERECT BUILDINGS WITHOUT PERMITS FROM LOCAL AUTHORITIES.

The Metropolitan Park Commission may erect buildings on metropolitan park reservations within the limits of the city of Boston without obtaining building permits from the local authorities.

To the Metro-
politan Park
Commission.
1899
June 23.

Your letter of June 19 states that the Metropolitan Park Commission has made arrangements for the erection of a building on the Charles River reservation, a tract of land owned by the Commonwealth, and in charge of the commission. The opinion of the Attorney-General is requested upon the question whether it is necessary for the Board to obtain building permits of the city of Boston.

The statutes creating the Metropolitan Park Commission give

the Board power to erect buildings. St. 1894, c. 288, § 3; St. 1894, c. 483, § 3; St. 1895, c. 450, § 1. The parks are the property of the Commonwealth; and the Board, in erecting buildings thereon, acts as the agent of the Commonwealth in exercising the authority of the sovereign over its own property. Its acts are the acts of the Commonwealth. In the exercise of the authority thus conferred upon it, it is not deemed to be subject to regulations affecting the citizens of the Commonwealth, unless made applicable to its proceedings by clear intendment of the statute establishing such regulation.

St. 1892, c. 419, and acts in amendment thereof, regulate the erection of buildings in the city of Boston. These statutes provide, among other things, for the establishment by the city of Boston of a department for the inspection of buildings, in charge of a person styled an inspector of buildings. The inspector shall not give a permit for the erection of any building until he has become satisfied that the building has sufficient strength, and that means of ingress and egress are sufficient. No building may be erected without such permit from the inspector. An applicant for a person whose application has been refused may appeal to a board of appeal provided by the statute. The statutes contain other minute provisions relating to the strength of timber to be used, the weight of iron, the size of columns and the manner of construction of brick work, the compliance with which may be enforced by the inspector of buildings. A person violating the provisions of these statutes may be punished by a fine.

It is impossible to suppose that the Legislature by these enactments intended to limit the authority of the Commonwealth over its own property. The statutes are designed to secure the safety of citizens having occasion to occupy the buildings. It is not to be presumed, however, that the Commonwealth will disobey its own laws, nor that it is necessary that a local officer should oversee the work of the agents of the Commonwealth in the carrying on of the work of the Commonwealth itself. See 1 Op. Atty.-Gen. 290.

I am of opinion that the building laws relating to the city of Boston have no application to the erection of buildings by the Metropolitan Park Commission.

**GAS COMPANY — BUSINESS CARRIED ON BEYOND LIMITS OF
COMMONWEALTH — APPROVAL OF GAS AND ELECTRIC LIGHT
COMMISSIONERS TO ISSUES OF STOCK AND BONDS.**

A gas company organized under the general laws of this Commonwealth is subject to the provisions of St. 1894, c. 450, requiring the approval of the Board of Gas and Electric Light Commissioners to issues of stocks and bonds, although all its business is carried on outside the limits of the Commonwealth.

To the Board
of Gas and
Electric Light
Commis-
sioners.
1899
June 27.

The Iowa Light, Heat and Power Company was organized under the provisions of the general laws of Massachusetts. Its purpose is stated in its articles of incorporation to be, among other things, that of "purchasing or constructing, holding, maintaining and operating plants for the production of light, heat and power, by means of gas, electricity, etc." The capital stock is fixed at \$50,000. The corporation is not engaged in business in this Commonwealth, but owns and operates an electric light plant in Marion, Ia. The corporation has requested your commission to approve its issue of stock and bonds, under the provisions of St. 1894, c. 450, — one of the statutes commonly known as the anti-stock-watering laws. The opinion of the Attorney-General is requested upon the question whether that statute requires you to approve the proposed issue in the case of the corporation, in question, in view of the fact that it carries on no business in this Commonwealth.

The statute authorizing the formation of gas companies under general laws (Pub. Sts., c. 106) does not in terms limit the operations of companies so formed to the Commonwealth. On the contrary, § 50 of that chapter provides in terms that: "Every corporation which is subject to this chapter may in its corporate name purchase, hold, and convey such real and personal estate as is necessary for the purposes of its organization; may carry on its business, or so much thereof as is convenient, beyond the limits of the commonwealth, and may there purchase and hold any real or personal estate necessary for conducting the same."

It is true that many of the provisions of the statutes relating to gas and electric light companies are obviously limited to companies doing business within this Commonwealth. For example,

St. 1885, c. 314, § 9, provides that the authorities of a town in which a gas company is located may complain to your Board of the quality or price of gas delivered, and thereupon the Board, after hearing, may make such order in relation to price or quality as it thinks proper. Section 10 of the same chapter restrains gas companies from digging up the streets without the consent of the mayor and aldermen. St. 1886, c. 346, § 5, provides that your Board may order a gas company to supply gas to a person petitioning therefor, upon such terms as may be reasonable. These and other like provisions are plainly intended to apply only to gas companies carrying on their business in this Commonwealth. It does not follow, however, that none of the provisions of the statutes refer to corporations doing business without the Commonwealth. Those relating to the requisites of organizing corporations, to annual returns, and to the liability of directors and stockholders, must be taken to be applicable to all corporations alike. It may in general be said that all provisions relating to any specific class of corporations are alike applicable to all such corporations, unless it is plainly apparent, in view of all the circumstances, that they should be limited to those carrying on business within the Commonwealth.

The statute relating to the issuing of stock and bonds by gas companies (St. 1894, c. 450, § 1) provides in terms as follows: "Gas companies and electric light companies, whether such companies are organized under general laws or under special charters, and however authorized to issue capital stock and bonds, shall hereafter issue only such amounts of stock and bonds, as may from time to time, upon investigation by the board of gas and electric light commissioners be deemed and be voted by them to be reasonably requisite for the purposes for which such issue of stock or bonds has been authorized."

It may fairly be assumed that the principal purpose of the Legislature in enacting this statute was to protect consumers from being obliged to contribute to the payment of dividends upon fictitious or over-valued stock; and there is no reason to suppose that there was any purpose of protecting consumers in other States. It is also true, however, that the effect of this and

of other like statutes relating to public-service corporations is to promote confidence in the securities of companies organized under the laws of Massachusetts. In view of the high standing which Massachusetts corporations have attained under the legislation of the Commonwealth, it may be doubted whether statutes whose effect is not only to protect the public, but also to promote confidence in the securities of Massachusetts corporations, were intended to be applicable to some corporations and inapplicable to others of the same character. The statute in question contains no exception whatever, and is in terms applicable to all corporations engaged in the business of supplying gas or electric lighting.

Moreover, the corporation in question may at any time engage in business in this Commonwealth. If it should do so, the commission could not know its true standing, nor proceed intelligently in the approval of stock and bonds issued for that purpose, without a knowledge of the situation in Iowa, where it is already carrying on business.

Upon the whole, therefore, I am of opinion that the corporation in question is subject to the provisions of St. 1894, c. 450. The matter of expense to the Commonwealth need not be considered, for, under the provisions of St. 1885, c. 314, § 6, and St. 1887, c. 382, § 4, such expenses are to be borne by the corporation.

PARIS EXPOSITION — MONOGRAPHS AS EXHIBITS ON PART OF COMMONWEALTH.

The Board of Paris Exposition Managers is authorized, by Res. 1898, c. 91, to publish a series of monographs on topics illustrating the relative importance of Massachusetts in comparison with other States, to be used as exhibits on the part of the Commonwealth at the Exposition at Paris in 1900.

To the Board
of Paris
Exposition
Managers.
1899
June 27.

Your letter of June 21 states that "one of the exhibits at the Exposition at Paris in 1900 in the department of Education and Social Economy is to be a printed series of monographs, intended for limited free distribution, based upon which will be exhibits illustrative of the points made in these monographs. Each

monograph is to cover a particular topic, and of course will cover that topic for the whole United States. In this group fall nearly all the activities of the State."

Your letter further states that the Director of Education and Social Economy has invited the State of Massachusetts to furnish a number of these monographs, to be exhibited and catalogued as exhibits on the part of the Commonwealth. These will include a description of the work of the Commonwealth itself, but will cover a much larger field. The question submitted by your Board is whether such work is within the scope of Res. 1898, c. 91, and Res. 1899, c. 93.

The resolve of 1898, after establishing a Board of Paris Exposition Managers on the part of the Commonwealth, provides that the Board shall have charge of the interests of the Commonwealth and its citizens in the preparation and exhibition "of the natural and industrial products of the Commonwealth, and of objects illustrating its history, progress, and material welfare and development, and of all other matters relating to the said exposition." The resolve of 1899 appropriates the sum of fifty thousand dollars "for the purpose of exhibiting at the . . . exposition . . . the arts, industries, institutions, resources, products and general development of the Commonwealth, and for distributing at said exposition information to all nations relative to the manufacturing and mercantile business of the Commonwealth, which will assist in the export of the Massachusetts products."

Strictly construed, the language of these resolves does not authorize the preparation of monographs, which, as stated in your letter, are intended to cover a topic for the whole United States, and will, therefore, be a history of the development of the industry treated of not only in Massachusetts, but in other States as well. If the scope of the work of your commission were to be thus strictly defined, I should feel constrained to advise you that you should not enter upon the work proposed.

I am of opinion, however, that so narrow an interpretation was not the intent of the Legislature. It is impossible in advance to prescribe the limits of such a work as the preparation of ex-

hibits for an international exhibition. The field is a broad one, and is likely to broaden still further as the time of the exhibition draws near. It was undoubtedly the purpose of the Legislature to see to it that Massachusetts, her history, development and standing, were fully and adequately presented at the exposition. If your commission think that that can be done more satisfactorily by such a history as will show the relative importance of Massachusetts in comparison with the other States of the Union, I am of opinion that you are not prevented from so doing by a too strict construction of the terms of the resolves. A large discretion is confided to your Board. The amount of money appropriated is fixed; but, farther than the fact that your duties are limited to what may not be improperly called an advertisement of Massachusetts, I do not think you are to be held so strictly that if you deem it wise to do so, you may not show not merely her importance, but her relative importance as well, among States of the Union.

If, therefore, in your discretion the work contemplated is so regarded by you, I am of opinion that the language of the resolve is broad enough to give you authority to enter upon its performance.

LICENSED FIREMEN—COAL SHOVELLERS IN A LARGE BOILER PLANT.

Men employed in simply putting coal under the boilers in a large boiler plant, subject to the orders and directions of a licensed fireman, whose duty it is to take care of the water for the boilers, and direct the men in their work, are not required, by St. 1899, c. 368, to have licenses.

To the Chief
of the Massa-
chusetts Dis-
trict Police.
1899
July 6.

Your letter of June 1 requires the opinion of the Attorney-General upon the following question, to wit: "In a large boiler plant, where many men are employed simply putting coal under the boilers, subject to the general orders and directions of a licensed fireman present in the boiler room, whose duty it is to take care of the water for the boilers and direct the men in their work, are such men required to have licenses under St. 1899, c. 368?"

In an opinion to you, dated September 29, 1897 (1 Op. Atty.-

Gen. 485), I advised you that "in a large boiler plant, where many men are employed as firemen, simply putting coal under the boilers, with a fireman in charge to take care of the water for the boilers," such men were not required to be licensed, under the provisions of St. 1896, c. 546. The statute upon which that opinion was given made it unlawful for any person "to have charge of, or to operate a steam boiler or engine" (with certain exceptions), unless he held a license therefor. I further stated, as the reasons which led me to the conclusion arrived at, that the statute was intended for the security of the public and those employed or having business in the vicinity of steam boilers, by providing that those who had charge of such boilers should possess the skill necessary for their safe operation; and that the word "operate," as used in that statute, was to be taken as meaning the directing or superintending of the working of the boiler, and that the statute did not apply to mere laborers, who had no responsibility or authority in the matter.

St. 1899, c. 368, does not, in my judgment, require a modification of the conclusions stated in my former opinion. It provides in § 4 that: "Licenses shall be granted according to the competency of the applicant, and shall be distributed in the following classes: . . . Firemen's licenses: First, to operate any boiler or boilers. Second, to have charge of and operate low-pressure heating boilers where the pressure carried is less than twenty-five pounds to the square inch. . . ." Section 5 provides that: "The words 'have charge,' in this act, shall be construed to designate the person under whose supervision a boiler or engine is operated. The 'person operating' shall be understood to mean any and all persons actually engaged in generating steam in any power boiler."

Whether, as I understand is claimed, the intention of those procuring the passage of this act was to extend the provision of existing legislation, requiring persons operating steam boilers to be licensed therefor, to mere laborers, it is clear that the language employed fails to accomplish any such intention, even granting that it would be constitutional to require a mere laborer to be licensed. It is, to say the least, doubtful whether such a law would be within the provisions of the Constitution.

Commonwealth v. Perry, 155 Mass. 117, 121. In the broader sense of the words used in the statute, every person having to do with any labor connected with the operation of steam boilers, such as coal hoisters, shovellers, and men employed to bring coal in wheelbarrows, might be said to be engaged in the business of "generating steam" in a power boiler.

Such a construction would obviously be absurd. I cannot believe that it was the intention of the Legislature to require that every laborer, who has a mere mechanical duty to perform in relation to the work of generating steam in a boiler, must be licensed. Licenses are granted to persons having special qualifications for the work for which the license is issued; and a construction which requires the issuing of a license to a person whose work requires no special skill and involves no danger to the public is not to be favored, especially in a penal statute, which is to be strictly construed.

I am still of the opinion, notwithstanding the statute of this year, that licenses are not required for mere laborers, whose duties require no skill and involve no responsibility.

INSURANCE — FOREIGN COMPANY — ADDITION OF MARINE TO
FIRE BUSINESS — CERTIFICATE OF ADMISSION — INSUR-
ANCE COMMISSIONER.

A foreign insurance company, authorized by its charter to do both fire and marine business, was admitted to do business in this Commonwealth in 1874, but it could then do only fire business here, as its capital was only \$200,000. It has since increased its capital to \$300,000, and it may now do both fire and marine business in this Commonwealth.

No duty devolves upon the Insurance Commissioner of granting permission to it now to do marine business, as there never has been any statute that authorized the Insurance Commissioner to state in the certificate of admission which he gave to a foreign company any one kind of business it might do. So, after a company is once admitted, it may do any business here that its charter and the laws of the Commonwealth permit.

To the Insur-
ance Com-
missioner.
1899
July 6.

Your letter of June 9 requests the opinion of the Attorney-General upon the question whether the Security Insurance Company of New Haven, Conn., is authorized to do both fire and marine insurance business in this Commonwealth.

The charter of the company authorizes it to do both classes of business. It was admitted to this Commonwealth in 1874, but it could then do only fire insurance business, as its capital stock was only \$200,000. It has now increased its capital stock to \$300,000, and claims the right to do marine insurance business, in addition to fire insurance business.

St. 1872, c. 375, was in force when the company was admitted. Section 16 provided: "No insurance corporation or association of any other state or country shall be hereafter admitted to do business in this state, unless it has at least the amount of unimpaired capital stock or funds required of like corporations or associations hereafter organized in this state, located in the city of Boston." Section 2 provided: "The capital stock of a joint stock company" (a domestic joint stock company) "insuring against loss or damage by fire, or by fire and lightning only, shall not be less than two hundred thousand dollars if the company is located in Boston. . . . If insuring marine or inland risks, either alone or in conjunction with fire risks, its capital stock shall not be less than three hundred thousand dollars if the company is located in Boston."

St. 1879, c. 130, provided, in § 1, that, whenever a foreign insurance company authorized to transact more than one kind of business applied for authority to transact business in this Commonwealth, it should elect one kind of business which it desired to transact in this Commonwealth, and, if admitted, it should be restricted to that kind of business. Section 2 provided that any company then doing business should elect before the first day of the next July the one class or kind of business it would do in this Commonwealth thereafter. But § 3 specially exempted companies transacting the business of marine insurance in connection with fire insurance. That statute, therefore, never applied to the Security Insurance Company.

St. 1879, c. 130, was inserted as § 201 of the codification of the insurance laws in Pub. Sts., c. 119. Section 196 of that chapter provided: "No foreign insurance company shall be admitted to do business in this Commonwealth unless it has at least the amount of unimpaired capital stock or funds required

of like companies hereafter organized in this Commonwealth, located in the city of Boston." And § 29 allowed domestic stock companies located in Boston, having a capital of \$300,000, to do fire and marine insurance business. When the insurance laws were codified, in St. 1887, c. 214, it was provided, in § 29, that domestic companies could be formed to do fire or marine business, but not to do both. It was also provided by § 80 that "No foreign insurance company hereafter admitted to do business in this Commonwealth shall be authorized to transact more than one class or kind of insurance therein." That section has since remained unchanged in the statutes of the Commonwealth. See St. 1889, c. 356, § 1; St. 1891, c. 195, § 1; St. 1894, c. 133, § 3; St. 1894, c. 522, § 80. It is plain, however, that this provision never applied to a company that was already admitted.

St. 1887, c. 214, prohibited the formation of domestic corporations to do both marine and fire insurance business, and this provision has been continued in St. 1894, c. 522, § 29. The same statutes provided that no foreign insurance company should be admitted and authorized to do business until it had satisfied the Insurance Commissioner that it had a paid-up and unimpaired capital of an amount not less than is required by similar companies formed under the provisions of our laws. St. 1887, c. 214, § 78; St. 1894, c. 522, § 78. And by St. 1894, c. 522, § 31, domestic companies formed to do a marine insurance business must have a capital stock of \$300,000.

It is clear, however, that none of the statutes enacted since the admission of the Security Insurance Company of New Haven apply to it. The statutes all refer to companies "hereafter admitted," both as to the amount of capital required and the kind of business they may do. The Security Insurance Company has as much capital now as it would have been required to have in order to do marine insurance business in this Commonwealth when it was admitted, and as much as it would have been required to have if it had been admitted at any time previous to the enactment of St. 1887, c. 214, § 80. It has as much capital as a domestic marine company formed now would be required to have, although no domestic company could now be formed to do

marine insurance business and fire insurance business too. I am of opinion that there is nothing in the statutes which prohibits it from doing marine insurance business.

Your letter further states that the company "asks to be permitted to do marine business here." As I am of the opinion that it is authorized to do marine business in this Commonwealth, no duty of granting permission therefor devolves upon you. At the time the company was admitted there was no statute authorizing any form of certificate to be given to it by the Insurance Commissioner. St. 1887, c. 214, § 78, cl. 5, provided that the company should obtain the Insurance Commissioner's certificate that it had "complied with the laws of the Commonwealth and is authorized to make contracts of insurance." The same provision is in St. 1894, c. 522, § 78, cl. 5, but those sections apply only to companies admitted after they were enacted.

This company is already admitted, and is entitled to do such business as it is authorized to do by law, regardless of whether the Insurance Commissioner permits it or not. 1 Op. Atty.-Gen. 47.

CORPORATION — AMOUNT OF CAPITAL OF MANUFACTURING CORPORATION FORMED UNDER GENERAL LAWS.

St. 1899, c. 199, repeals so much of Pub. Sts., c. 106, § 7, as imposed a maximum limit of one million dollars upon the capital of a manufacturing corporation formed under general laws.

Your letter of June 6 requires my opinion upon the question whether, in view of St. 1899, c. 199, you would be justified in approving a capital of a manufacturing corporation in excess of one million dollars.

To the Com-
missioner of
Corporations.
1899
July 7.

Pub. Sts., c. 106, § 7, provides that corporations may be formed for the purpose of carrying on any manufacturing business (with certain exceptions) "with a capital of not less than five thousand nor more than one million dollars."

St. 1899, c. 199, provides in § 1 that: "For the purpose of carrying on any mechanical or manufacturing business, . . . three or more persons may associate themselves together with

the intention of forming a corporation with a capital of not less than five thousand dollars. Such corporation shall be subject to all laws now or hereafter in force relating to such corporations." The second section of the same chapter authorizes any such corporation to increase its capital to such amount as may be determined by the stockholders.

It was the obvious intention of the statute of this year to repeal the maximum limitation of one million dollars. The statute, it is true, does not in terms repeal any of the provisions of the Public Statutes, but, on the contrary, makes corporations formed under it subject to all existing provisions; which in terms would include the limitation of one million dollars. It may be suggested, therefore, that by implication the limitation is still in force.

If, however, such a construction were to prevail, § 1 of the act of this year, above quoted, would be entirely useless and superfluous, being a re-enactment, without change, of an existing statute. Furthermore, inasmuch as § 2 authorizes an indefinite increase of capital, it would follow that there is a limitation of the amount of original capital, but with the right forthwith to increase to an indefinite amount. This cannot have been the intent of the Legislature.

In my judgment, the statute of this year is to be construed as repealing so much of the previous statute as imposed a maximum limit upon the amount of capital of manufacturing corporations formed under general laws.

SUPERINTENDENT OF SCHOOLS — TENURE OF OFFICE.

The term of office of a superintendent of schools does not expire at the end of the year for which he was appointed, when the school committee fail to appoint a successor; and he is entitled to hold the office until his successor is appointed.

Your letter of March 10 requests the opinion of the Attorney-General upon the following question: "Section 43, chapter 44 of the Public Statutes, provides for the election of a superintendent of schools by a majority vote of the school committee.

To the State
Board of
Education.
1899
July 8.

In a case where a superintendent has been elected for a year and his term of office has expired, the school committee, by a tie vote, fails to make any election. Does the term of the superintendent end with the year for which he was originally chosen, or can it be construed to continue him in office until a successor is chosen?"

Pub. Sts., c. 44, § 43, provides that: "A city by ordinance, and a town by vote, may require the school committee annually to appoint a superintendent, who, under the direction and control of said committee, shall have the care and supervision of the public schools."

I assume that there has been a vote of the town in question requiring the school committee to appoint a superintendent, which has not been rescinded, and was in force at the time of the tie vote in question.

The members of the school committee are public officers. *McKenna v. Kimball*, 145 Mass. 555, 556. In this case Mr. Justice Wm. Allen, in delivering the opinion, said: "The school committee is a board of public officers whose duties are prescribed by statute, and in the execution of its duties the members do not act as agents of the town, but as public officers in the performance of public duties." For the reasons there stated, it is not difficult to determine that a superintendent of schools chosen by the school committee under the direction of the town is also a public officer, and not merely the agent or employee of the school committee. He has important public duties to perform, under the direction and control of the school committee, but in the performance of those duties he must necessarily be left largely to his own discretion.

The superintendent being a public officer, his tenure of office in case of the failure of the school committee to elect his successor depends upon general principles of law applicable to public officers. It has long since been settled in this Commonwealth that a public officer is entitled to hold office until his successor is elected. "The better opinion is that town officers annually chosen hold their offices until others are chosen and qualified in their place." Shaw, C.J., in *Overseers of the Poor v. Sears*,

22 Pick. 122, 130. "To guard against lapses, sometimes unavoidable, the provision is almost always made in terms that the officer shall hold until his successor is elected and qualified. But even without such a provision, the American courts have not adopted the strict rule of the English corporations which disables the mayor or chief officer from holding beyond the charter or election day, but rather the analogy of the other corporate officers who hold over until their successors are elected, unless the legislative intent to the contrary be manifested." Dillon, *Municipal Corporations*, § 219.

It has been long expressly provided in our statutes that town officers should serve until others were chosen and qualified in their stead. Rev. Sts., c. 15, § 33; Gen. Sts., c. 18, § 31; Pub. Sts., c. 27, § 78. The school committee are not included in terms in the sections referred to, each of which enumerates the officers required to be chosen at the annual town meeting. The omission to designate the school committee among those so to be chosen is undoubtedly due to the fact that special provisions govern the election of a school committee. Pub. Sts., c. 44, § 21. There is no reason for supposing that the tenure of office of the school committee was intended to be different from that of other town officers. The statute in question devolves upon the school committee the duty of electing a superintendent of schools when ordered to do so by the town. It is the intention of the town, as expressed by its vote, that there shall be a superintendent of schools; and it would be, in my judgment, unreasonable to adopt a construction of the statute which would enable the school committee, by a failure to elect at the end of the year, from whatever cause, to defeat the will of the town.

Some expressions in the opinion of *Kimball v. Salem*, 111 Mass. 87, may seem to be at variance with the views above stated, particularly the following: "The duty or authority of the school committee, under the vote of a town or ordinance of a city, is one which is to be performed or exercised by them annually. The statute manifestly contemplates an appointment for the year; and not from time to time, at the discretion of either branch of the municipal government." The question in that

case, however, was whether, by repealing the ordinance providing for the election of a superintendent, that officer could be deprived of the right to his compensation for the year for which he was elected; and the court held that, having been chosen for a year, he could not be deprived of his office by a vote repealing the ordinance. The language quoted must be taken to refer to that question only, and is not authority in favor of the proposition that, if the school committee fail to elect a successor, the office thereby becomes vacant.

The recent case of *Attorney-General v. John T. Clark*, in the Supreme Judicial Court for the county of Worcester, although a *nisi prius* decision, is authority for the views I have stated. It was an information in the nature of a *quo warranto* by the Attorney-General against John T. Clark, superintendent of schools in Southbridge. He was elected superintendent of schools by the committee under a vote of the town, for a year beginning Sept. 1, 1896. In 1897 no superintendent was elected, but Clark assumed to exercise the duties of superintendent, and refused to give up the possession of the books and papers in his control. Holmes, J., in dismissing the information, said: "There is no time fixed in Pub. Sts., c. 44, § 43, for the election of a successor of the respondent, and I am of opinion that he holds over, in accordance with what Chief Justice Shaw pronounced the better rule in 22 Pick. 130."

For the reasons above stated, and especially in view of the decision last quoted, I am constrained to advise the Board that the term of office of a superintendent of schools does not expire by reason of the failure of a school committee to elect a successor, but that he is entitled to hold his office until the school committee discharge the duty devolving upon them by the statute.

EMINENT DOMAIN — APPROPRIATION FOR DAMAGES — CONSTITUTIONAL LAW.

The Board of Harbor and Land Commissioners is not precluded from taking areas in South Bay in the city of Boston, under authority of St. 1899, c. 469, because no specific sum is appropriated by that act to pay damages for such takings. The act does appropriate so much money as may be necessary to pay the damages which may be assessed under it, and it is therefore constitutional.

To the Board
of Harbor and
Land Com-
missioners.
1899
July 8.

Your letter of July 7 requires my opinion upon the following question: "Referring to chapter 469, Acts of 1899, which became a law July 3, I have the honor to inquire whether this Board is precluded from going ahead and taking areas in South Bay in the city of Boston, by reason that no specific appropriation appears to have been made for the purpose of damages for such takings, or for any other reason."

The statute above referred to amends St. 1898, c. 278, § 4, so as to read as follows: "The board of harbor and land commissioners, subject to the approval of the governor and council, is hereby authorized to purchase or otherwise take in fee from time to time, in the name and behalf of the Commonwealth, the whole or any portions of the area lying between the harbor lines hereinbefore established, or any rights therein. All damages sustained by reason of such taking as aforesaid shall be paid out of the treasury of the Commonwealth, and the governor is hereby authorized to draw his warrant therefor. Such damages shall be agreed upon by said board and the person or corporation injured; and if the parties cannot agree a jury in the superior court of the county in which the property taken is situated may be had to determine the same, in the same manner as a jury is had and damages are determined in the case of persons dissatisfied with the estimate of damages sustained by the laying out of ways in the city of Boston: *provided, however*, that no suit for such damages shall be brought after the expiration of one year from the date of the recording of the taking as herein required. Within sixty days after any land, flats or rights therein are acquired or taken under this act, the board shall file and cause to be recorded

in the registry of deeds for the county in which the property is situated, a description thereof sufficiently accurate for identifying the same, with a statement that the land, flats or rights therein are taken under the provisions of this act, in the name and behalf of the Commonwealth. Said description and statement shall be signed by said board or a majority thereof, and certified as approved by the governor and council."

In the case of *Talbot v. Hudson*, 16 Gray, 417, the Supreme Court was called upon to determine the question of the constitutionality of St. 1860, c. 211. That act authorized the taking down and removal of a portion of a dam across the Concord River, and provided that any person injured in his property by the work authorized might have his damages estimated by the county commissioners in the same manner, with certain immaterial exceptions, as damages caused by the laying out of highways were estimated; and that either the person injured or the Commonwealth, if dissatisfied with the award of the county commissioners, might have the matter determined by a jury as in the case of highways.

Section 3 of that act reads as follows: "Any damages that may be recovered on such application, together with legal costs, shall be paid out of the treasury of the Commonwealth; and the governor is hereby authorized to draw his warrant therefor."

The validity of this statute was called in question in the case above referred to on several grounds; among others, it was contended that the statute was unconstitutional, because it contained no reasonable, certain and adequate provision for compensation to those whose property might be taken and appropriated in carrying out the purposes of the act.

The court, in an opinion by Bigelow, C.J., said: "It seems to us that there is an obvious and decisive answer to this objection. By the third section of the act it is provided that the damages which may be recovered on due proceedings had by the parties injured shall be paid out of the treasury of the Commonwealth, and the Governor is authorized to draw his warrant therefor. This is clearly an appropriation of so much money as may be necessary to pay the damages which may be assessed under the

act. The provision could not be more explicit or definite as to the amount appropriated. Until the damages are ascertained and adjudicated, the sum which will be required to pay them is necessarily uncertain. There is no provision of law which makes it requisite to the validity of an appropriation from the treasury of the Commonwealth that a specific sum should be named and set apart as a fund to meet a particular exigency. It is sufficient if by an act or resolve passed during the same or the preceding political year the payment is authorized. St. 1858, c. 1, §§ 1, 2; Gen. Sts., c. 15, §§ 30, 31. That such an appropriation affords a remedy sufficiently adequate and certain is too clear to admit of doubt. It is a pledge of the faith and credit of the Commonwealth, made in the most solemn and authentic manner, for the payment of the damages as soon as they are ascertained and liquidated by due process of law. Unless we can say that such a provision affords no reasonable guaranty that the persons injured will receive compensation, we cannot adjudge the statute to be unconstitutional. We certainly cannot assume that the Commonwealth will not fulfill its obligations. The presumption is directly the other way. Indeed, the plaintiffs do not aver in their bill that the damages which may be awarded to them under the act will not be duly paid. How, then, can it be said that no suitable and adequate provision is made in the act by which the plaintiffs can receive the compensation to which they may be entitled?"

The language of St. 1899, c. 469, so far as it relates to the payment of damages, is precisely similar to that contained in St. 1860, c. 211, § 3, which section was construed in the case above referred to as amounting to an appropriation of so much money as might be necessary to pay the damages assessed under the act. That case has not been overruled, but, on the contrary, the language above quoted was referred to with approval in the case of *Connecticut River Railroad Co. v. County Commissioners*, 127 Mass. 50, 55. Since the case of *Talbot v. Hudson* was decided no statutes have been passed which are now operative requiring that an appropriation from the treasury of the Commonwealth should be of a specific sum or in any other way affecting this

question. No other objection to the validity of the statute referred to in your letter appears.

I am, therefore, of opinion that St. 1899, c. 469, is constitutional; and that, so far as the question of the validity of this statute is concerned, your Board is not precluded from exercising the powers given to it thereby.

BOARD OF EDUCATION — WESTFORD ACADEMY — APPROVAL AS
HIGH SCHOOL — CONSTITUTIONAL LAW.

Westford Academy is a private school, and is "not under the order and superintendence of the authorities of the town" of Westford; and the State Board of Education may refuse to approve it, either for the purpose of authorizing the town of Westford to pay the tuition of children living therein and attending that academy, under St. 1895, c. 94, or for the purpose of securing to other towns reimbursement by the Commonwealth of money expended for the tuition of children in that academy, under the provisions of St. 1898, c. 496, § 3.

Strictly speaking, the duty of the Board is that of approval of an academy in respect to the grade of its work; but, as towns may not pay the tuition of pupils attending Westford Academy, the Board, in the exercise of its discretion, may withhold its approval of it for that reason.

Your letter of June 10 encloses a copy of an indenture between the town of Westford and the trustees of the Westford Academy, and requests the opinion of the Attorney-General upon the following questions: —

To the State
Board of
Education.
1899
July 12.

First. — "Is it legal for the State Board of Education, either under the provisions of St. 1895, c. 94, or under the provisions of that act as supplemented by the aforesaid indenture, to approve Westford Academy for the purposes of said act, should it desire to do so?"

Second. — "Is it legal for the State Board of Education, either under the provisions of St. 1898, c. 496, § 3, or under the provisions of that section as supplemented by the aforesaid indenture, to approve Westford Academy for the purpose of insuring to towns the reimbursement of money expended for tuition in that academy?"

The statute referred to in your questions (St. 1895, c. 94) provides, in § 1, that: "Any town in which a high school is not

maintained, but in which an academy of equal or higher grade is maintained, may grant and vote money to pay the tuition of children residing in such town and attending such academy: *provided*, such academy is approved for that purpose by the state board of education."

On March 18, 1896, in response to an order of the Senate, I advised that honorable body that in my opinion the statute in question, in so far as it purported to authorize the payment of money by a town to an incorporated academy not under the control of the town, is in violation of Art. 18 of the Amendments to the Constitution, which provides in terms that "moneys raised by taxation in the towns and cities for the support of public schools . . . shall be . . . expended in no other schools than those which are conducted . . . under the order and superintendence of the authorities of the town or city in which the money is to be expended." 1 Op. Atty.-Gen. 319.

If I am correct in this opinion, it is necessary to ascertain, before answering your questions, whether Westford Academy is under the order and superintendence of the authorities of the town of Westford. If not, the town may not lawfully pay the tuition of its pupils.

All the authority and superintendence which the authorities of the town of Westford may exercise over Westford Academy is derived from the provisions of the indenture submitted with your letter. The only provisions affecting the question are the following:—

"And it is further agreed that the said trustees [of the academy] shall provide a grade of education equal to that provided by high schools.

"And it is further agreed that, in order to determine whether or not the grade of education provided by the said trustees is, at any time, up to the said required standard, there shall be a Board consisting of three members, hereinafter called the Super-vising Board; that one of these three members shall be appointed by and from the school committee of the said town of Westford, one by and from the said trustees, and the third by the two members appointed in the foregoing manner, and who shall not be a member of either of said boards; that the term of office

of each member shall expire on the last day of June of each year; that, in case of the death or resignation of any member, a successor shall be appointed by the same parties that appointed the said members so deceased or resigning, and that a new Supervising Board shall be appointed at the last of June each year."

"And it is further agreed that the superintendent of schools of said town of Westford shall superintend the methods of education employed in said academy, and the results obtained and all matters appertaining in any way to his connection with the academy shall be reported to the said Supervising Board at his desire or their call, and shall also be included in his report to the town each year. In case of controversy, the Supervising Board to decide and adjudge and fully settle all points and differences."

It is obvious that the above provision for a Supervising Board consisting of three members, only one of whom is selected by the school committee of the town, does not give to the authorities of the town the order and superintendence of the school. The provision that the town superintendent of schools shall superintend "the methods of education employed in said academy" also fails, in my opinion, to put the institution under the order and superintendence of the town authorities within the meaning of that expression as used in the Amendment to the Constitution. The authority of the superintendent is limited to methods of education, and he may not exercise any other control over the institution, its management or discipline. The principal purpose of the amendment was doubtless to prevent the use of moneys raised or appropriated for the support of the public schools for the purpose of sustaining sectarian schools. The academy at Westford may or may not be sectarian in its character. There is nothing, however, in the agreement between the trustees and the town which prevents it from being so, or in any way limits the character of religious instruction or services which may prevail in the academy. The arrangement between the town and the academy differs essentially from that relating to the Powers Institute in the town of Bernardston, which, in an opinion to you, dated March 8, 1897 (1 Op. Atty.-Gen. 427), I advised you make the academy to all intents and purposes a school under the control of the authorities of the

town. In that case the trustees of the academy are elected by the inhabitants of the town and must be citizens of the town, and they are required to make an annual report to the town. Westford Academy, however, is wholly independent of the town, excepting so far as the town superintendent may exercise supervision over the methods of instruction. As this does not place the academy under the order and superintendence of the authorities of the town, the case, in my opinion, comes within the prohibition of the Amendment to the Constitution.

Strictly speaking, the duty of the Board of Education is that of approval of an academy in respect to the grade of its work. The Board, in exercising the duties entrusted to it under St. 1895, c. 94, § 1, is not concerned with the question whether the town may or may not lawfully pay the tuition of pupils in any given case. But, as the towns may not pay the tuition of pupils attending the academy, I see no reason why, in the exercise of your discretion you should not for that reason withhold your approval of the institution.

The answer to your second question is governed by the foregoing considerations. Westford Academy, being a private school, not "under the order and superintendence of the authorities of the town," is therefore not a high school, and the State Board of Education has no authority to approve it as a high school. It follows that the State should not reimburse any town for the tuition of children sent to Westford Academy.

SUPERINTENDENT OF SCHOOLS — UNION OF TOWNS TO EMPLOY — ARTICLE IN TOWN WARRANT.

An article in the warrant of a town, "to see if the town will vote to form a union with" another town "for the purpose of employing a superintendent of schools," is sufficient to authorize the voters of that town to vote for such union, although St. 1898, c. 466, is not referred to in the article, especially as there is no other statute under which a union of towns for that purpose could be affected.

To the State
Board of
Education.
1899
September 5.

Your letter of September 2 states that the towns of Merrimac and Billerica have formed a district for the employment of a school superintendent, under the provisions of St. 1898, c. 466;

and that the action of the town of Billerica was based upon an article in the warrant for the town meeting, which was as follows: —

“Article 2. — To see if the town will vote to unite to form a union with the town of Merrimac for the purpose of employing a superintendent of schools, or do anything in relation to the same.”

The question submitted by your letter is whether this article is sufficient, in view of the fact that it does not refer to the statute authorizing such a union.

There is no form of union for the purpose of employing a superintendent of schools possible to towns within this Commonwealth excepting under the provisions of the statute referred to. It is to be presumed, therefore, that the union referred to in the warrant was under that statute, and that the voters so understood, and that they voted with that understanding.

The Supreme Judicial Court long since determined, as a wise rule of construction, that the proceedings of towns and town officers were not to be judged with strictness, but rather to be construed with liberality. As was said by Morton, J., in *Strong, Ptr.*, 20 Pick. 484, 492: “From the men who usually are, and necessarily must be, employed to make them, great formality or nicety cannot be expected and should not be required.” See also *Commonwealth v. Smith*, 132 Mass. 289.

In the present case there is no manner of doubt as to what was intended by the warrant, and as to the intention of the voters who acted upon it. A person learned in the law would undoubtedly have referred specifically to the statute authorizing the proceedings. I do not deem it necessary, however, and I have no difficulty in advising you that the vote of the town upon the warrant quoted sufficiently authorizes the formation of the district.

PAUPER — MARRIED WOMAN — SETTLEMENT — DERIVATIVE
SETTLEMENT OF SON.

A woman, whose husband died in January, 1874, without ever having gained a settlement in Massachusetts, lived in Boston from that time until her death, in 1889. She therefore gained a settlement in her own right, in January, 1879, which was not affected by the retroactive provisions of St. 1879, c. 242. Her son became of age before she gained a settlement, and therefore did not derive one from her, and, since he has never gained one in his own right, he is an unsettled person.

To the Super-
intendent of
State Adult
Poor.

1889
September 20.

Your letter of September 1 requires the opinion of the Attorney-General upon facts stated in the letter as to the settlement of a certain pauper.

Your letter states that he was born in Boston, December 23, 1855, and consequently became of age December 23, 1876. He never acquired a settlement in his own right. His father was born in New Hampshire, and came to Boston in 1852, where he died January 28, 1874, never having acquired a settlement in Massachusetts. His mother came to Boston with her husband in 1852, and resided in that city continuously as a married woman until her husband's death, in January, 1874, and subsequently as a widow, in the same place, until her death, in April, 1889.

Upon the facts stated, the mother of the pauper was undoubtedly settled in Boston. If this settlement was acquired prior to 1876, when the pauper became of age, he would take the same settlement by derivation from her. If, however, she did not acquire her settlement in Boston until after 1876, he would derive no right therefrom. It is well settled that only minors can gain a derivative settlement from their parents. *Springfield v. Wilbraham*, 4 Mass. 493. The answer to your inquiry depends, therefore, upon the determination of the question when the mother acquired her settlement in Boston.

St. 1874, c. 274, § 2, provides that: "Any woman of the age of twenty-one years who resides in any place within this state for five years together without receiving relief as a pauper shall thereby gain a settlement in such place." By § 3 of the same act it is provided that "any unsettled person shall be deemed to have

gained a settlement upon the completion of the residence and taxation herein required, though the whole or a part of the same accrues before the passage of this act." It has been held that this statute, though general in its terms, only applies to unmarried women. *Somerville v. Boston*, 120 Mass. 574. Under this statute, therefore, the mother of the pauper would not have begun to acquire a settlement until the death of her husband, in 1874; but, having resided as a widow in Boston from that time until her death, in 1889, she would have acquired, in January, 1879, under its provisions, a settlement in Boston, having then completed her five years' period of residence therein as an unmarried woman.

But, in consequence, doubtless, of the decision in *Somerville v. Boston*, above referred to, limiting the operation of the statute of 1874 to unmarried women, a statute was enacted in 1879 (St. 1879, c. 242), providing that the provisions of St. 1878, c. 190, § 1, cl. 6 (which was a re-enactment of St. 1874, c. 274, § 2, above quoted), should extend to married women, and by § 2 making its provisions retroactive as to unsettled women. The word "unsettled" in this section means unsettled at the time when the act took effect. *Worcester v. Great Barrington*, 140 Mass. 243; *Midleborough v. Plympton*, 140 Mass. 325.

If, therefore, the mother of the pauper was an unsettled woman when the statute of 1879 took effect, she would, under that statute, be deemed to have acquired a settlement in Boston when she had lived with her husband in Boston for five years, or in 1857. At that time her son, the pauper in question, was a minor, and would, consequently, have a settlement in Boston by derivation from his mother.

But the mother was not an unsettled woman when the statute of 1879 took effect. It was enacted April 22, 1879, and became law May 22 of the same year. The five years' residence as a widow, which settled her in Boston under the provisions of the statute of 1874, expired in January, 1879. She therefore gained a settlement in January, 1879, which was not affected by the retroactive provisions of the statute of that year. It follows that when the pauper, her son, became of age, in 1876, his mother

cannot be said to have been settled in Massachusetts, and he derives no settlement from her.

It has been suggested that, inasmuch as the statute of 1879 is in amendment of the provisions of the statute of 1878, the later statute is to be taken as incorporated into and made a part of the provisions of the statute of 1878, so far as to be a part of the same statute; and, that, consequently, rights under the statute of 1878, as amended by the statute of 1879, would be acquired as of the date of the passage of the statute of 1878. There is nothing in this contention worthy of serious consideration. Section 2 of the statute of 1879 is not an amendment of the statute of 1878, in the sense that it re-enacts the section amended, merely adding new words to the language of the former section. It is an independent enactment, containing new provisions; and those provisions cannot be law until they are enacted. "Generally, a statute speaks from the time it takes effect." Morton, C.J., in *Worcester v. Great Barrington*, *ubi supra*, p. 245. A statute affecting settlement laws may be retroactive in its provisions, but it cannot be taken to be retroactive as to the time when it takes effect.

TELEPHONE AND TELEGRAPH POLES — DAMAGES FOR REMOVAL FROM LAND TAKEN BY METROPOLITAN PARK COMMISSION.

The Commonwealth is not liable in damages to a telephone and telegraph company for the removal of its poles from land taken by the Metropolitan Park Commission, when the right of the company to maintain such poles is founded upon a mere license given by the person who owned the land before it was taken by the commission.

To the Metro-
politan Park
Commission.
1899

September 21.

Your letter of July 7 requires the opinion of the Attorney-General upon the question whether the American Telephone and Telegraph Company have a valid claim against the Commonwealth for the taking by the Metropolitan Park Commission of certain lands for the Blue Hills Reservation.

Your letter states that, prior to the taking of the land by the commission, the owner had signed and delivered to the company an instrument purporting to give to the company the right to construct, operate and maintain poles and telephone lines over

said land. The essential portions of the instrument in question are as follows: —

“Received of the American Telephone and Telegraph Company of Massachusetts forty dollars, in consideration of which I hereby grant unto said company, its successors and assigns, the right to construct, operate and maintain its lines over and along the property which I own, or in which I have any interest, in the town of Braintree, county of Norfolk and State of Massachusetts, including the necessary poles and fixtures along the roads, streets or highways adjoining the property owned by me in said town, in full payment for such right, and in full satisfaction for the trimming of any trees along said lines necessary to keep the wires cleared at least eighteen inches, and with the right to set the necessary guy and brace poles, and attach to trees the necessary guy wires.

“Witness my hand and seal this fourth day of September, 1889, at Braintree, Mass.”

The instrument was signed by the owner, but was not sealed.

The Commonwealth is not liable, unless the instrument in question conveyed to the company rights in the land which would bind a grantee of the owner. Being unsealed, however, it has no more force than a mere license, which, it is well settled, is revoked when the estate concerning which the license is given is conveyed by the licensor. *Fentiman v. Smith*, 4 East. 107; *Cook v. Stearns*, 11 Mass. 533. The right to do some act of a permanent nature on the land of another cannot be created by a license, even when in writing, executed upon good consideration. It can only be created by a deed or conveyance operating as a grant. Such license is sufficient protection to the licensee while it lasts, but it may be revoked at any time, and after its revocation it cannot be used as protection for any further acts. *White v. Manhattan Railway Co.*, 139 N. Y. 19; *Mumford v. Whitney*, 15 Wend. 380.

A lease for a period of less than seven years may be given by a writing unsealed. The instrument in question, however, cannot be so regarded. It has none of the attributes of a lease. A conveyance of a freehold interest in land, whether for life or in perpetuity, must be by an instrument under seal. The instrument in

question being unsealed, gives the company rights only as against the signer thereof. These rights are lost by conveyance, or by taking under the right of eminent domain.

It follows that the Commonwealth is not liable to the company.

MASSACHUSETTS AGRICULTURAL COLLEGE — RATES OF TUITION.

The trustees of the Massachusetts Agricultural College may establish such rates of tuition and remit them in such cases as they deem to be for the interests of the college.

To the
Governor.
1899
September 21.
—

Your favor, enclosing a letter from the president of the Massachusetts Agricultural College, requires the opinion of the Attorney-General upon the question whether the trustees of that institution have the right, in any case, to remit the established fee for tuition of students.

In general, trustees of colleges may fix such rates of tuition for students as they see fit. They may also require the payment of tuition from certain students, and not from others; and they may even require no tuition fee whatever from any person. Unless restrained by special provision of their charters, or by limitations or conditions in their endowments, the whole matter of tuition is in their exclusive control.

The Massachusetts Agricultural College does not differ in this respect from other like institutions. It was chartered by St. 1863, c. 220, which was amended by St. 1864, c. 223. Its charter differs from that of other colleges in the Commonwealth in making one of its objects the teaching of "such branches of learning as are related to agriculture and the mechanic arts, in order to promote the liberal and practical education of the industrial classes in the several pursuits and professions of life;" in providing for the filling of vacancies in the board of trustees by the Legislature; in constituting the Governor of the Commonwealth, the secretary of the Board of Education and the secretary of the Board of Agriculture members of the corporation, *ex officio*; and in providing that the "location, plan of organization, government and course of study prescribed for the college shall be subject to the

approval of the governor and council." The statute further appropriates for the building and maintaining of the college a portion of the proceeds of land scrip received by the Commonwealth from the United States, by virtue of the act of Congress approved by the President July 2, in the year 1862. Appropriations have also been made by the Legislature from time to time for the maintenance of the college.

But there is no limitation upon the right of the trustees to regulate rates of tuition. In this respect they have the same powers as trustees of other institutions; and they may establish such rates of tuition and remit them in such cases as they deem to be for the interests of the college.

METROPOLITAN PARK COMMISSION — RULES AND REGULATIONS FOR USE OF CHARLES RIVER — POWERS OF PARK POLICE.

The Metropolitan Park Commission does not have the power to make rules and regulations for the use of portions of the Charles River bordered upon by the lands of the Charles River Reservation.

The general powers of the metropolitan park police are defined by St. 1897, c. 221, § 3.

Your letter of May 14 requires the opinion of the Attorney-General as to the power of the Metropolitan Park Commission to make rules and regulations for the use of those portions of the Charles River bordered upon by land of the Charles River Reservation.

To the Metro-
politan Park
Commission.
1899
September 23.

St. 1893, c. 407, § 4, authorizes the Board to "make rules and regulations for the government and use of the public reservations under their care, and for breaches thereof fix penalties," etc. St. 1894, c. 288, § 3, also authorizes the Board to "make rules and regulations for the government and use of the roadways or boulevards under its care." By St. 1898, c. 463, § 1, the Board is authorized, "for the purpose of making the rivers and ponds within the metropolitan parks district more available as open spaces for recreation and exercise, to regulate the use of certain spaces along or near said rivers and ponds within said district."

The foregoing statutes, which comprise all that give authority to the commission to make penal regulations, clearly do not authorize the establishment by the Board of rules for the use of the Charles River where it is bordered upon by the lands of the Charles River Reservation.

As incident to its ownership of the lands bordering upon the river, the Board has certain rights of control to a limited extent over the use of the waters, especially those portions above the dam at Watertown; but these are rights which all riparian owners have, and do not confer upon the Board any more authority to make rules and regulations, punishable by fine or imprisonment, than have other riparian owners. *Proprietors of Mills v. Commonwealth*, 164 Mass. 229.

Your letter also requires "as to the powers generally of the metropolitan park police on the waters of the Charles River lying within the metropolitan parks districts."

By St. 1897, c. 121, § 3, it is provided that "The police appointed or employed by said commission . . . shall have within the metropolitan parks district all the powers of police officers and constables of cities and towns of this Commonwealth except the power of serving and executing civil process." It does not occur to me how I can state the general powers of your police officers more explicitly than to refer you to the language above quoted.

INTERNAL REVENUE LAW — REGISTERS OF PROBATE AND INSOLVENCY — CONGRESS — TREASURER OF THE COMMONWEALTH.

Registers of probate and insolvency are not required to pay for internal revenue stamps affixed to certificates and certified copies furnished by them, nor is the Commonwealth. When a stamp is required upon a document furnished by them, it must be paid for by the person for whose use it is issued.

Congress has no authority to tax the States, and it is the duty of the Treasurer of the Commonwealth to refuse to reimburse officers of the Commonwealth for money expended by them for revenue stamps.

To the Treasurer and
Receiver-General.
1899
September 23.

Your letter of September 9, enclosing a communication from the register of probate and insolvency for Middlesex County, requires the opinion of the Attorney-General upon two questions: —

First. — Should the Commonwealth pay for stamps affixed by registers of probate to certificates and certified copies?

Second. — Should registers of probate refuse to issue certificates and certified copies which it is their duty to furnish on demand, without payment for the revenue stamp required under the ruling of the internal revenue commissioner?

The first question only concerns the performance of your duties as Treasurer. The second question is not one upon which you have occasion to require the opinion of the Attorney-General. For the convenience, however, of officers throughout the State, I submit my views upon both questions.

If the Commonwealth were to be required to reimburse its officers for money expended by them for United States revenue stamps affixed to instruments which they are by law required to furnish, it would amount to a tax by the United States upon the Commonwealth. This, it is well settled, is beyond the power of the federal government. *Collector v. Day*, 11 Wall. 113; *United States v. Railroad Co.*, 17 Wall. 322. The Treasurer of the Commonwealth, therefore, cannot be called upon to pay for stamps so affixed; and it is your duty to refuse reimbursement to officers of the Commonwealth therefor.

The answer to your second inquiry is governed by the same considerations. It is undoubtedly the duty of registers of probate in many cases to furnish copies of the records and papers in their custody to persons interested therein. Indeed, certain copies are to be furnished by them free of charge. Pub. Sts., c. 156, § 40; c. 199, § 24. Congress may not impose any tax or penalty upon State officers for the performance of their official duties. Such officers are agencies of the government of the State, and are beyond the sphere of the taxing power of the nation. *Moore v. Quirk*, 105 Mass. 49; *Carpenter v. Snelling*, 97 Mass. 452; *Clemens v. Conrad*, 19 Mich. 170.

Registers of probate and insolvency, therefore, may not be required to pay for stamps affixed to certified copies furnished by them. In cases where a stamp is required to be affixed to a document furnished by a register of probate, it must be paid for by the person for whose use it is issued. See 1 Op. Atty.-Gen. 566.

The United States Internal Revenue Act of 1898, § 6, does not specify whether the stamps to be affixed to an instrument shall be paid for by the one who issues it or by him for whose benefit and use it is issued. But the officer issuing the certificate cannot be compelled to affix a revenue stamp thereto, and he is not the agent of the United States government to collect its taxes. He is not concerned in the question whether the person for whose use and benefit it is issued shall obey the law; that is a matter between such person and the United States government.

BOARD OF EDUCATION — REGISTERS FOR SCHOOL STATISTICS —
PRIVATE EDUCATIONAL INSTITUTIONS.

The State Board of Education may furnish registers for the keeping of school statistics to private educational institutions free of charge.

To the State
Board of
Education.
1899
September 25.

By Pub. Sts., c. 41, § 13, it is made the duty of persons in charge of private educational institutions to "make a report in writing" to the State Board of Education "of such statistics as the board shall prescribe, relating to the number of pupils and instructors, courses of study, cost of tuition, and the general condition of the institution or school under their charge." Section 14 of the same chapter makes it the duty of the Board to "prepare blank forms of inquiry for such statistics," and to "send the same to every such institution or school on or before the tenth day of May in each year."

Your letter of the 14th inst. states that the Board has prepared a new school register for the use of the public schools in the Commonwealth. The expense of this register is authorized by St. 1899, c. 111, which provides that: "The board of education may expend annually a sum not exceeding one thousand dollars for the printing and distribution of such school registers, school blanks and forms for the returns of school committees as said board is required by law to furnish to the towns and cities of the Commonwealth." The question submitted by your letter is, whether the Board may send these registers to the officers of private edu-

cational institutions, for the purpose of compiling the statistics required.

Inasmuch as it is the duty of your Board to prepare blank forms of inquiry for statistics to be furnished by private educational institutions, if in the judgment of the Board the school registers provided for the public schools are well adapted to be used for the purpose of obtaining statistics from private educational institutions which the Board is required to obtain, and for which purpose it must provide blank forms of inquiry, I see no reason why you may not use the registers for that purpose.

PUBLIC RECORDS — INK FURNISHED TO CITIES, TOWNS AND COUNTIES.

St. 1899, c. 354, requiring public records of cities, towns, counties and the Commonwealth to be kept in ink "furnished by the commissioner of public records," does not require the commissioner to furnish ink to cities, towns and counties free of expense.

The act relative to inks for public records (St. 1899, c. 354) provides that: "No person having the care or custody of any public records in any department or office of the Commonwealth, or of any county, city or town therein, shall use or permit to be used upon any public record . . . any ink excepting such as is furnished by the commissioner of public records;" and that the ink so furnished shall be examined by a chemist, under the commissioner's direction. This act is a revision of St. 1894, c. 378, whose provisions were similar, excepting that the ink was to be furnished by the Secretary of the Commonwealth instead of by the Commissioner of Public Records.

To the Com-
missioner of
Public
Records.
1899
September 25.

The question submitted by your letter of September 8 is whether under the statute referred to, it is your duty to furnish such ink to the officers of counties, cities and towns at the expense of the Commonwealth. I presume that whatever doubt you have in the matter arises out of the use of the word "furnished" in the statute referred to, which prohibits the use of any ink by officers of counties, cities and towns excepting such as is "furnished" by

you. The word "furnish," however, does not mean to furnish free of expense, but simply to provide. I do not think any inference can be drawn that ink is to be furnished free of expense to counties and municipalities, merely because the law requires that it be furnished by the Commonwealth.

The Legislature has annually appropriated "for the purchase of record ink for public records a sum not exceeding five hundred dollars." Under this statute the Secretary of State, upon the advice of the Attorney-General, orally given, used the appropriation only for the payment of ink furnished to the departments of the Commonwealth, and for the employment of a chemist, as provided by the statute, to test the purity of the ink furnished. There is no appropriation for furnishing ink to counties, cities or towns, and it is plain that the Legislature have not construed the act in question as entailing upon the Commonwealth the expense of ink furnished by its officers excepting to the departments of the Commonwealth.

The purpose of the act was not to provide ink to counties and municipalities at the expense of the Commonwealth, but to insure the preservation of public records by requiring the use of ink approved by an officer of the Commonwealth, after chemical analysis under his supervision.

**MASSACHUSETTS REFORMATORY — RELEASE OF PRISONERS —
COMMISSIONERS OF PRISONS — RULES AND REGULATIONS.**

The Commissioners of Prisons have no authority to make rules and regulations respecting the release of prisoners from the Massachusetts Reformatory. By St. 1894, c. 255, § 33, the question of whether a prisoner should be released is left to the discretion of the Board upon the facts in each case.

To the Com-
missioners of
Prisons.
1899
September 26.

Your letter of July 13 requires the opinion of the Attorney-General upon the following questions: —

First. — Is it the duty of the Commissioners of Prisons to make a rule or rules which provide for the release of prisoners at the Massachusetts Reformatory?

Second. — If such rules are made by the Commissioners of Prisons, should they be approved by the Governor and Council?

Third. — If such rules are made, and approved by the Governor and Council, have the commissioners authority to temporarily suspend one or more of such rules?

It further appears from your letter that certain rules have been prepared by the commissioners, and approved by the Governor and Council, which provide for the release of prisoners from the reformatory.

The authority of your Board to make rules and regulations is found in St. 1884, c. 255, § 28, which provides as follows: "The commissioners of prisons shall have the general supervision of the said reformatory, and shall make all necessary rules and regulations for the government and direction of the officers in the discharge of their duties, for the discipline of the prisoners and the custody and preservation of the property of the said reformatory. They shall make special provision for grading and classifying the prisoners and establish rules for dealing with them according to their behavior, industry in labor, and diligence in study. All rules and regulations adopted by the said commissioners shall be subject to the approval of the governor and council."

It is clear that this statute does not, in express terms, require or even authorize the Board to make rules and regulations respecting the release of prisoners.

On the contrary, the exercise of the power of release vested in your Board by the statute appears to me to be of a nature inconsistent with the pre-establishment of any fixed rules upon the subject. It is found in St. 1884, c. 255, § 33, and is as follows: "When it shall appear to the commissioners of prisons that any person imprisoned in said reformatory has reformed, they may issue to him a permit to be at liberty during the remainder of his term of sentence, upon such conditions as they deem best; and they may revoke said permit at any time previous to its expiration."

It will be seen that the determination of the question of whether a person should be released under this statute is left to the discretion of the Board upon the facts in each case. It is impossible, in the nature of things, for the Board to prejudge a prisoner's case, and determine by a series of fixed rules and regulations, pre-

viously formulated, whether the prisoner has "reformed," within the meaning of the statute. It was the obvious purpose of the Legislature to require the commissioners to find in each case, as it arises, whether, in their judgment, the prisoner has reformed, and to base their action upon their finding as to this fact.

This being so, and there being nothing in the statute as above quoted authorizing the making of rules and regulations which refers in terms to the matter of release of prisoners, I am of opinion that it is not the duty of the commissioners to make rules providing in advance generally for the release of prisoners.

INSANE PAUPERS — JURISDICTION OF BOARD OF INSANITY WHEN
THEY ARE COMMITTED SUBJECT TO ORDERS OF COURT.

St. 1898, c. 433, § 11, does not confer upon the State Board of Insanity authority to send to other States, or even to any place within this Commonwealth, paupers committed to a lunatic hospital, who are nevertheless subject to the orders of the court.

To the State
Board of
Insanity.
1899
September 26.

St. 1898, c. 433, § 11, provides as follows: "The board may transfer insane pauper inmates, including those committed under the provisions of section fifty of chapter eighty-seven of the Public Statutes, section fifteen of chapter two hundred and thirteen of the Public Statutes, sections sixteen and nineteen of chapter two hundred and fourteen of the Public Statutes, and sections ten, twelve and fourteen of chapter two hundred and twenty-two of the Public Statutes, from any one of the state hospitals or asylums for the insane to another state hospital or asylum for the insane, and may transfer and commit inmates of the other state institutions to the state hospitals or asylums for the insane; and it may send any such insane pauper inmates to any state or place where they belong when the public interest or the necessities of the inmates require such transfer."

The question submitted by your letter of June 23 is whether, under this statute, the Board of Insanity may legally discharge from the institutions specified in said section any of the different classes of inmates therein described, and send them to any place

without the State before the expiration of sentence or other restriction imposed by the court, and without a pardon by the Governor.

The insane persons referred to in your letter include the following:—

First. — A person who, being held in prison on a charge of having committed an indictable offence, is not indicted by the grand jury, by reason of insanity. Pub. Sts., c. 213, § 15.

Second. — A person indicted, who at the time appointed for trial is found to the satisfaction of the court to be insane. Pub. Sts., c. 214, § 16.

Third. — One who is acquitted by the traverse jury, by reason of insanity. Pub. Sts., c. 214, § 19.

In all the foregoing cases it is expressly provided that the persons so found to be insane shall be committed by the court to a State lunatic hospital, under such limitations as may seem proper.

Fourth. — Convicts in the State Prison or Reformatory, who, having been found upon investigation to be insane, are, under the warrant of the Governor, removed therefrom to a State lunatic hospital. Pub. Sts., c. 222, § 10.

Fifth. — Convicts in a house of correction or prison other than the State Prison, who, having been found to be insane, are transferred by order of a judge of the Supreme Judicial or Superior Court to an insane hospital. Pub. Sts., c. 222, § 12.

Sixth. — Persons held in any jail for trial or for sentence who appear to be insane and are committed by a judge to a lunatic hospital. Pub. Sts., c. 222, § 14.

Persons of the three preceding classes, who have been committed under the provisions of the statutes to an insane hospital, are to be detained therein while insane; provided, however, that, if they become again sane, they shall be returned to the jail, house of correction or State Prison, as the case may be, there to be held under the original order of commitment.

Seventh. — “Any insane person confined by legal authority in a jail, house of correction or such county receptacle, who may be removed therefrom to a hospital by order of the governor.” Pub. Sts., c. 87, § 50.

From the foregoing enumeration it will be seen that, if the statute which is the subject of your inquiry is to be construed as authorizing the sending of such insane persons to any State or place where they belong, power is given to the Board, not alone to set aside the order of the court committing the person to the hospital, but practically to exercise the power of pardoning convicts, which, under the Constitution, is vested exclusively in the Governor. No other tribunal than the Governor, not the Legislature, even, may interfere with a sentence of the court in a criminal case, by way of pardon, or by anything which amounts to an abrogation of the sentence. *Opinion of Justices*, 14 Mass. 472. Such a construction of the statute is not to be entertained, therefore, if any other interpretation be possible.

Undoubtedly the grammatical construction of the section quoted at the beginning of this opinion would require that the phrase beginning "and it may send any such insane pauper inmates to any state," etc., should include all those mentioned in the first part of the section; but for the reasons I have already given, I think the Legislature did not so intend. The primary purpose of the section is to authorize the transfer of insane paupers, whether criminal or not, from one State institution to another. This may properly be done in the case of persons committed thereto by order of a judge, without interfering with the authority of the court or with the pardoning power of the Governor. It is not a violent strain upon the language of the section to construe this as its primary object, and to limit the application of the last clause, authorizing the Board to send prisoners to their homes in other States, as applying only to such inmates of State hospitals as are under the complete jurisdiction of the Board itself.

I am of opinion that this is the true construction of the section, and that, therefore, the section does not give your Board authority to send to other States, or even to any place within the State, persons committed to a lunatic hospital, but who are nevertheless subject to the orders of the court.

MEDICAL EXAMINERS — STILL-BORN INFANTS — ATTORNEY-GENERAL.

Medical examiners are not entitled to the opinion of the Attorney-General, and therefore are not bound by it.

When a medical examiner receives notice that the dead body of a person, who is supposed to have come to his death by violence, has been found, he should not decline to view it because it is reported to him to be the body of a still-born infant. If upon viewing it he determines that it is a still-born infant, there appears to be no reason why he should hold an autopsy.

Your letter of July 19 inquires as to the duties of a medical examiner in the case of still-born infants. It raises the question whether the bodies of infants born dead, which could have had no existence independent of the mother, are "dead bodies," within the meaning of the statute. The question is not one upon which the Attorney-General may give an authoritative opinion, for medical examiners are not entitled to his opinion, and are therefore not bound by it. I am very glad, however, to submit my views upon this very interesting question.

To the Medical
Examiner for
Suffolk
County.
1890
September 26.

The successive proceedings provided by Pub. Sts., c. 26, in the case of dead bodies are: first, a view; second, an autopsy; and third, an inquest. A view is to be had whenever the medical examiner "has notice that there has been found, or is lying within his county, the dead body of a person who is supposed to have come to his death by violence." An autopsy is to be held when, having viewed the body, and deeming "a further examination necessary," he is authorized in writing by the district attorney or town officers to perform it. An inquest is to be held when he certifies that, in his opinion, the death was caused by violence, and so reports to the district attorney and to the justice of the District Court.

It will be seen that the question whether there shall be an autopsy, and subsequently an inquest, depends, so far as the medical examiner is concerned, upon the opinion he forms as a result of his view of the body, and his inquiry into the circumstances; but the view itself is to be had whenever he is notified that there is found the dead body of a person "who is supposed to have come to his death by violence." The statute does not

specify upon whose supposition the view is to be had. It clearly is not the medical examiner, for he cannot form any opinion until he has viewed the body. It is obvious that the intention of the framers of the act was to authorize any officer, or even a private citizen, to give information of dead bodies found or lying within the district, to the end of securing in all cases of doubtful death the official view of a medical examiner, it being deemed wise in all doubtful cases that a view should be had. I have on other occasions expressed my sense of the importance of action by medical examiners in all doubtful cases. They are, it is true, not to incur expense needlessly or wantonly. But their principal function is to furnish evidence for the detection of crime, and it is of the first importance that in every case of doubt the examiner should see the body, that he may know definitely whether there may have been crime.

This being so, I do not think the medical examiner is called upon to deal with the discussion of the subtle question whether the dead body of a still-born infant can be deemed to be a "dead body" within the meaning of the statute. It is, nevertheless, a human body. If the medical examiner is notified that such a body is found, and that the supposition exists in the minds of those interested that there has been violence, he is not to refrain from viewing the body by any consideration of the question whether the body of a still-born infant is scientifically the body of a person. Indeed, the first question to be determined is whether it is in fact a still-born infant. Even if, upon a view, such appears to be the case, there may have been a violation of law in concealing its death if born a bastard. Other important questions may arise which can only be determined accurately by the inspection of a skilled physician.

If upon viewing the body he definitely determines that it is a still-born infant, there appears to be no reason why he should hold an autopsy; but I am clearly of the opinion that, when notice is received by him, as provided by the statute, that there has been found the dead body of a person who is supposed to have come to his death by violence, he should not decline to view the body for the reason that it appears to him upon the report received to be

the body of a still-born infant; but that, on the other hand, he should view the body, in order to be able, among other things, to ascertain that fact beyond doubt.

REGISTERED PHARMACIST — REVOCATION OF CERTIFICATE —
NEW EXAMINATION.

The Board of Registration in Pharmacy is not required to examine an applicant for a certificate as a pharmacist, if it has revoked a license formerly issued to him.

Your letter of September 29 requires the opinion of the Attorney-General upon the following question: "A registered pharmacist, holding a certificate of registration in pharmacy, issued by this Board, the holder of said certificate having been notified and appearing before the Board upon a formal complaint, the nature of the evidence being of such a character as to warrant the revocation altogether of his certificate of registration in pharmacy, the Board having done so under the provision of the pharmacy law, — has the defendant any legal right to compel the Board of Registration in Pharmacy to grant him an examination, in case the applicant should prove himself qualified to secure a second certificate of registration in pharmacy, thereby removing his disability and restoring him to his former position as a registered pharmacist?"

To the Board
of Registration
in Pharmacy.
1899
October 3.

A literal construction of the statute (St. 1896, c. 397) would undoubtedly require you to examine a person applying therefor, and to issue to him a certificate as a pharmacist, if found qualified, even though a license previously granted to him had been revoked by your Board. I cannot advise you, however, that the Legislature intended such a nullification of the provisions of its own statute.

If you are authorized to revoke permanently a license granted to a pharmacist, as the Legislature undoubtedly intended, you cannot be required to examine him for a new license.

Whether such a law is constitutional, it is not necessary now to consider. My only purpose is to advise you how, in my judgment, the law should be construed so as to carry out the intent of the Legislature.

HIGH SCHOOL — MANUAL TRAINING SCHOOL — TUITION — PAYMENT BY TOWN.

The Mechanic Arts High School of Springfield is not a high school within the meaning of St. 1898, c. 496, § 3, and the town of East Longmeadow is not required to pay the tuition of a child residing therein and attending such school. If it sees fit to pay it, it cannot ask reimbursement therefor from the treasury of the Commonwealth.

To the State
Board of
Education.
1899
October 6.

Your letter of September 15 requires the opinion of the Attorney-General upon two questions: —

First. — “Is East Longmeadow, a town in which no high school or school of corresponding grade is maintained, compelled to approve the attendance of a child at the Mechanic Arts High School at Springfield, and so to become responsible for the tuition of that child?”

Second. — “Can the State be called upon to reimburse the town for such payment?”

Upon the facts stated in a supplementary letter from you, it appears that the town of East Longmeadow is within the provisions of St. 1898, c. 496, § 3, which provides that: “Any town of less than five hundred families or householders in which a public high school or a school of corresponding grade is not maintained shall pay for the tuition of any child who resides in said town and who attends the high school of another town or city, provided the approval of such attendance by the school committee of the town in which the child resides is first obtained.” The section further provides for the imposition of a penalty upon any town which refuses to pay the tuition in such cases, and upon a member of the school committee who refuses to approve the attendance of a child residing in such town in the high school of some other town or city, if qualified to enter such high school.

Section 4 of the same statute provides that: “Every town and city of twenty thousand or more inhabitants shall maintain as part of both its elementary and its high school system the teaching of manual training.” East Longmeadow, being a town of less than twenty thousand inhabitants, is therefore not required to provide manual training for its children, either in its own schools

or by paying tuition to towns in which manual training is required. The city of Springfield, being required to provide for manual training both in its elementary and high school system, has established the Mechanic Arts High School therefor. It is a school in which manual training is made a specialty, although other branches are taught to some extent. The tuition for children attending from other towns is, as I am informed, the same as that required for attendance at the regular high school.

I am of opinion that the term "high school" in the statute is used in its ordinary and well-understood acceptation, and signifies the school described in §§ 1 and 2 of the same statute; that is to say, in which instruction is given in "such subjects designated in section one as it may be deemed expedient to teach in the high school, and in such additional subjects as may be required for the general purpose of training and culture, as well as for the special purpose of preparing pupils for admission to state normal schools, technical schools and colleges." The subjects designated in § 1, it is true, include manual training; but I do not think a school in which the teaching of manual training is made the principal and special work is the sort of high school intended in the section requiring towns not maintaining such an institution to pay the tuition of scholars attending in towns where such schools are maintained. This is especially true in respect to such towns as East Longmeadow, in which manual training is not a required study.

The answer to your second question follows from a consideration of the first question. The provision for reimbursement to towns for amounts expended for tuition from the treasury of the Commonwealth is in the same section (§ 3) and provides that "all necessary sums which have been actually expended for high school tuition under the provisions of this section" shall be reimbursed to the town within its provisions. The expression "all necessary sums" in my judgment refers to the sums which the towns are compelled to pay. If the town sees fit to expend money for tuition which it is not compelled to, it cannot ask reimbursement therefor from the treasury of the Commonwealth.

STATE OFFICERS — WHEN ENTITLED TO OPINION OF ATTORNEY-GENERAL.

Officers of the State government are entitled to the opinion of the Attorney-General only upon questions necessary or incidental to the discharge of the duties of their office.

To the
Adjutant-
General.
1899
November 15.

I have the honor to acknowledge your letter of November 2, propounding several questions for the Attorney-General, touching the interpretation of St. 1893, c. 367, § 33.

Officers of the State government are entitled to the opinion of the Attorney-General upon questions necessary or incidental to the discharge of the duties of their office. The questions stated in your letter are interesting and important, but I am unable at present to see how they in any way concern the performance of your duties as Adjutant-General. I must, therefore, beg to be excused from answering them.

BOSTON SCHOOL FOR THE DEAF — SECTARIAN INSTITUTION — APPROVAL BY BOARD OF EDUCATION — CONSTITUTIONAL LAW.

A school for the instruction of the deaf is not a public school, within the meaning of the eighteenth amendment to the Constitution, and the tuition of deaf children attending such an institution, even if it is maintained by a religious denomination, may be paid by the Commonwealth.

The State Board of Education may approve the Boston School for the Deaf as an institution to which such children may be sent at the expense of the Commonwealth.

To the State
Board of
Education.
1899
November 15.

Your letter of October 20 requires the opinion of the Attorney-General upon the question whether, under the provisions of St. 1888, c. 239, the approval by the Board of Education of the Boston School for the Deaf would be in accordance with the Constitution and statutes of the Commonwealth, particularly with Art. 18 of the Amendments to the Constitution.

The statute in question provides in § 1 that: "Upon the request of the parents or guardians and with the approval of the state board of education, the governor may send such deaf mutes or

deaf children as he may deem fit subjects for education, for a term not exceeding ten years in the case of any pupil, to the American Asylum at Hartford in the state of Connecticut, the Clarke Institution for Deaf Mutes at Northampton, or to the Horace Mann School at Boston, or to any other school for deaf mutes in the Commonwealth, as the parents or guardians may prefer." The section further provides for the payment of the expenses of such children from the treasury of the Commonwealth.

Your letter states that the Boston School for the Deaf is under the control of a religious denomination, although it is claimed that the instruction given in the school is entirely non-sectarian. For the purposes, however, of the present question, I do not deem it necessary to inquire whether this claim be true; for I am of opinion that no provisions of the Constitution, or amendments thereto, prohibit the approval by your Board of the school under consideration.

The amendment in question is as follows: "All moneys raised by taxation in the towns and cities for the support of public schools, and all moneys which may be appropriated by the state for the support of common schools, shall be applied to, and expended in, no other schools than those which are conducted according to law, under the order and superintendence of the authorities of the town or city in which the money is to be expended; and such moneys shall never be appropriated to any religious sect for the maintenance, exclusively, of its own school." This amendment was adopted in 1855. Its principal purpose, as appears from the history of the proceedings of the convention of 1853, was to insure permanently the expenditure of the income of the Massachusetts School Fund for the support of the common or public schools. It is sometimes said to have been adopted for the purpose of preventing the appropriation of public funds for the support of sectarian institutions of learning. Although this result undoubtedly follows from the fact that the common and public schools of the Commonwealth are non-sectarian, such does not seem to have been the primary purpose of the amendment, and such, indeed, is not its language. Excepting in the last clause, the amendment contains no restriction whatever as to sect. It pro-

vides, in terms, that public moneys, raised for the support of public or common schools, shall be expended only in schools carried on under the supervision of the authorities of the town or city in which the money is to be expended.

The meaning of the terms "common" or "public" schools, as used in the amendment, is well settled. In *Jenkins v. Andover*, 103 Mass. 94, 99, speaking of public schools and common schools, Chief Justice Chapman said: "These are the schools to which the eighteenth article applies, — schools which towns are required to maintain, or authorized to maintain, though not required to do so, as a part of our system of common education, and which are open and free to all the children and youth of the towns in which they are situated, who are of proper age or qualifications to attend them, or which adjoining towns may unite to support as a part of the same system. . . . This class of schools does not include private schools which are supported and managed by individuals; nor colleges or academies organized and maintained under special charters for promoting the higher branches of learning, and not specially intended for, nor limited to, the inhabitants of a particular locality."

Again, in *Merrick v. Amherst*, 12 Allen, 500, 508, Chief Justice Bigelow said: "The phrases 'public schools' and 'common schools' have acquired under the legislation and practice of this State a well-settled signification. They are never applied to the higher seminaries of learning, such as incorporated academies and colleges. These, in a certain broad and comprehensive sense, are public institutions, because they are controlled by corporations, and are usually open to all persons who are willing to comply with the terms of admission and tuition. But the broad line of distinction between these and the 'public or common schools' is, that the latter are supported by general taxation, that they are open to all, free of expense, and that they are under the immediate control and superintendence of agents appointed by the voters of each town and city. That the amendment was intended to apply only to these schools is manifest, not only from the terms in which it is expressed, but also from the history of its origin and adoption as part of the organic law."

It is to such schools that the amendment relates. But the education of deaf mutes is no part of the common school system of the Commonwealth, and has never been so regarded by the Legislature. Special provisions from time to time have been made for the support and training of that class of children, and for many years an annual appropriation has been made therefor. But the provisions of the eighteenth amendment have no more to do with these matters than with any other of the great philanthropies of the Commonwealth.

It is scarcely necessary to say that the last clause of the amendment, to wit: "such moneys [meaning moneys appropriated by the State for the support of public and common schools] shall never be appropriated to any religious sect for the maintenance exclusively of its own school," is not intended to prohibit the State from paying for the education and support of its mutes in any institution carried on for that purpose, public or private, and whether under the control of a religious denomination or not.

For these reasons, I am of opinion that there is nothing in the Constitution of Massachusetts which prevents your Board from approving the Boston School for the Deaf as an institution to which such children may be sent at the expense of the Commonwealth.

**MASSACHUSETTS HOSPITAL FOR EPILEPTICS — SANE EPILEPTICS
— COMMITMENT — CONSTITUTIONAL LAW.**

An epileptic who is not insane cannot be committed to the Massachusetts Hospital for Epileptics.

The Legislature has no constitutional authority to enact a law authorizing the commitment to and indefinite detention in a hospital or other place of detention of a sane person who has committed no crime.

Your letter of October 13 requires the opinion of the Attorney-General upon the question: "Whether an epileptic, who is not insane, may legally be committed to the Massachusetts Hospital for Epileptics, in the same manner as applies to the commitment of an insane epileptic of the proper class. And whether such commitment conveys the same power of detention as in the case of an insane epileptic."

To the State
Board of
Insanity.
1899
December 1.

The Hospital for Epileptics was established under the authority of St. 1895, c. 483. Section 8 of that chapter, as amended by St. 1899, c. 211, § 1, is as follows: "When the buildings altered or constructed under the provisions of this act are so far completed that in the opinion of the trustees the admission of patients may properly be made thereto, said trustees shall so notify the governor, who shall thereupon issue his proclamation establishing the Massachusetts hospital for epileptics, and thereafter the trustees may receive into said hospital for care and treatment any person of the age of fourteen years or more, not a criminal, who is subject to epilepsy, provided such person be neither an idiot, an inebriate or violently insane."

By § 9 of the same chapter it is provided that: "The provisions of the Public Statutes and amendments thereto consistent with this act, applicable to the state lunatic hospitals, regarding the commitment, detention, transfer and discharge of insane patients, are hereby made applicable to the Massachusetts hospital for epileptics, and insane epileptics may hereafter be committed to the said hospital for epileptics, provided such persons are of the class mentioned in section eight."

Section 10 relates to the reception and detention of persons at their own request, and is not material to the present inquiry.

It will be seen that, under § 9 above quoted, only epileptics who are insane may be committed to the Hospital for Epileptics, in the same manner and under the same provisions as insane persons are committed to other lunatic hospitals. It is scarcely necessary to say that, even if the statute purported to provide otherwise, it would be unconstitutional. The Legislature may not enact a law authorizing the commitment to and indefinite detention in a hospital, or any other place of detention, of sane persons who have committed no crime.

STATE HIGHWAY — STREET RAILWAY — ALTERATION OF LOCATION — ASSESSMENT OF EXPENSE.

St. 1898, c. 578, §§ 16 and 24, confer upon the Massachusetts Highway Commission authority to alter a location granted by the local authorities to a street railway company, before the street was taken as a State highway, and to assess the expense thereof upon the railway company, or upon the Commonwealth, or upon both. An assessment upon the Commonwealth must be paid out of the appropriation for the commission.

No part of such expense can be assessed upon abutters.

Jurisdiction to alter a location granted after the street was taken for a State highway remains in the local authorities.

Your letter of July 11 requires the opinion of the Attorney-General upon the question "as to what proportion, if any, of the expense of altering the location of street railway tracks on State highways, when done under the orders of the Massachusetts Highway Commission, may be borne by said commission, under the provisions of § 16, c. 578 of the Acts of 1898; also what interpretation should be put upon the phrase 'such party or parties,' in the last sentence of said section."

To the
Highway
Commission.
1899
December 6.

The section in question was originally enacted in St. 1864, c. 229, § 14. So much of this section as relates to alteration of the location of tracks is as follows: "The location and position of any tracks may be altered upon application of any party interested, by the same authority, and in the same manner, as is herein provided for the original location. The expense of such alteration shall be borne by such party as the board of aldermen or selectmen may determine." It is obvious that the Legislature did not contemplate that the expense of such alteration should necessarily be borne in whole, or even in part, by the company. An examination, moreover, of the proceedings which led to the enactment of this section, makes it clear that the Legislature had no such intent. An amendment was proposed in the House, the effect of which would be to impose the entire expense of alteration upon the corporation; but the amendment was rejected. But just who were intended to be included in the expression "such party" is a question of some difficulty.

A change in the position of railway tracks upon a street may be of benefit to the railway company, to the municipality or to the

abutters, or even to all of them. It does not necessarily follow, however, that authority is given to the municipal board to assess the expense of alteration upon all these parties. Even if it were constitutional to tax abutters for such expenses, which may be doubtful, it is very clear that the statute does not intend that this should be done by the Board. Statutes authorizing assessments for local improvements upon estates especially benefited usually provide that such assessments constitute a lien which may be enforced upon such estates. Furthermore, if the Legislature had intended that abutters should be assessed, it is probable that provision would have been made for such assessment in the usual manner; to wit, by providing some rule of proportion, based upon peculiar and special benefits to property, by which the local authorities should be governed. No rule of assessment is laid down, and the matter is left to the sole discretion of the local authorities. An assessment under this statute might be determined upon any ground which the local authorities deemed just and proper, and might not be founded, in any great degree, if at all, upon special and peculiar benefits, and might even, in any particular case, largely exceed such benefits. This fact would constitute no objection to an apportionment between political sub-divisions of the Commonwealth. *Sears v. Boston*, 173 Mass. 71. But it would be sufficient to render the statute unconstitutional when applied to the case of individuals; for taxation by special assessment is constitutionally possible only when founded upon special and peculiar benefits to the property, on account of which the tax is laid, and then only to an amount not exceeding such special and peculiar benefits. *Sears v. Street Commissioners*, 173 Mass. 350; *Sears v. Boston*, 173 Mass. 71.

None of these objections, however, may be urged against giving the Board authority to assess the whole or any portion of such alteration upon the city or town. Cases may and undoubtedly do often arise where the alteration is sought solely for the convenience of the public, or to make it easier and more economical for the municipality to keep the street in repair. In such cases it is not difficult to conclude that the Legislature had in mind that the expense of altering the tracks might be properly imposed by

the Board ordering the alteration upon such city or town. A municipal corporation, it is true, may not be charged with the burden of furnishing money other than for public purposes. *Prince v. Crocker*, 166 Mass. 347, 361. *Agawam v. Hampden*, 130 Mass. 528, 536. But the expense of altering the location of railway tracks in a street may be an expense incurred for a public purpose. The original location of tracks in a public highway is granted wholly for the use and benefit of the public, and no exclusive or private rights are granted to the corporation. A location is merely a license to use the public highway for a special method of transportation of travellers thereon, and is in fact granted by the municipal body only after an adjudication that it is required by "the interests of the public." Pub. Sts., c. 113, § 7. See also: *Metropolitan R.R. Co. v. Quincy R.R. Co.*, 12 Allen, 262; *Attorney-General v. Metropolitan R.R. Co.*, 125 Mass. 515, 517; *Howe v. West End Street Ry. Co.*, 167 Mass. 46, 49. The recent legislation authorizing the building of a subway by the city of Boston, and the leasing of it to a street railway company, was upheld on the ground that the expense incurred was for public purposes. *Prince v. Crocker*, 166 Mass. 347.

Under the authority of the case last cited, it is obvious that an act authorizing a city or town to lay rails for street railways and lease them for such use would be constitutional. This being so, it is no less obvious that the expense of altering the location of street railway tracks from their original to a new location in the street may be an expense incurred for a public purpose, for which the public may be taxed. If the alteration of a location is necessary for the convenience of the public, and improves the highway for ordinary travel as distinguished from street railway travel, the work of alteration is undoubtedly for a public use, and the municipality may properly be assessed therefor.

I have no doubt, therefore, that it was the intention of the original act to give to the Board having jurisdiction to order the alteration of tracks and the assessing of the expense therefor the right to determine also how far such expense should be borne by the railway company, and whether any part of it should be assessed upon the municipality; but, for the reasons above stated, I

am of opinion that it was not the intention of the Legislature to authorize the assessing of any portion of such expense upon abutters, even though their estates may be benefited by such alteration.

The section I have been considering (St. 1864, c. 229, § 14) was re-enacted in the Pub. Sts., c. 113, § 22, in substantially the same words; but in 1898 a new statute in relation to street railways was enacted (c. 578), and in that act some changes were made in the language of the section. The new section (§ 16) provides that the expense of the alteration "shall be borne by such party or parties, and in such proportions, as the board of aldermen or selectmen may determine." I do not think, however, that this change of language can be taken to indicate any change in the purpose of the Legislature as to the duty of the Board having jurisdiction to order such alteration and to assess the expense thereof; and what I have said as to the interpretation of the section as it was originally enacted, and as it appears in the Public Statutes, applies with equal force, in my opinion, to the section as it now stands.

It remains to consider whether, under this section, the Commonwealth, in the case of street railways located on a State highway, may be a party benefited in the sense that a portion of the expense of altering the location of such tracks may be assessed upon it. The legislation concerning the jurisdiction respectively of the State Board and the municipal authorities over street railways in State highways is by no means clear, and, to say the least, is somewhat inconsistent.

The first statute relating to this question, so far as it concerns State highways, is St. 1896, c. 541, which provided in § 1 as follows: "Whenever in the construction of a state highway it becomes necessary, in the opinion of the Massachusetts highway commission, to change the location, relay or change the grade of that part of any street railway located on said highway . . . said commission may . . . order the company owning or operating said railway to make such changes: *provided, however*, . . . the cost of making the same . . . shall be paid by said commission; said cost with interest at a rate not exceeding four per cent. per

annum shall be paid by said railway company to the Commonwealth in ten equal annual payments." By St. 1897, c. 355, § 4, the provisions of the section above quoted were made to include the repair of a State highway as well as the construction thereof.

In August, 1896, the Highway Commission requested the opinion of the Attorney-General on the question: "Do the selectmen of a town lose their powers to direct a railway company to move its tracks or make any other changes, under Pub. Sts., c. 113, § 22, on the passage of St. 1896, c. 541?" The Attorney-General, in November, 1896, advised the commission that while a State highway was in process of construction the commission had exclusive jurisdiction under the statute in question to determine what changes should be made in a street railway located on said highway; but that when the highway was constructed, the jurisdiction as to such changes, conferred upon the local authorities by Pub. Sts., c. 113, § 22, revived. 1 Op. Atty.-Gen. 392.

The statute of 1896, above quoted, was repealed by the street railway act of 1898. St. 1898, c. 578, § 26. St. 1897, c. 355, § 4, above referred to, was not in terms repealed; but the statute of which it was an amendment having been repealed, such repeal must, in my opinion, be deemed to have repealed the amendment as well. By the statute of 1898 the jurisdiction of the State Highway Commission over railways already located in State highways before the taking thereof for the purpose of a State highway is defined by § 24 of that act, which provides that: "Whenever a street, road, bridge or other public way in which a street railway location has been previously granted by the local authorities is laid out, taken charge of or constructed by or under authority of the state highway commission, said commission shall thereafter, so long as it has charge thereof, have and exercise with regard to the location and maintenance of street railways therein the same authority, in the same manner and subject to the same provisions, as is conferred by this act upon boards of aldermen and selectmen, such authority to be exercised in the same manner, subject to the same provisions, and subject to the same rights on the part of abutters and street railway companies, as are herein provided with respect to the relocation and maintenance of street

railways in public ways not under the jurisdiction or charge of said commission."

It will be seen that the effect of this section is to give to the Massachusetts Highway Commission, in cases where the location existed before the way was taken as a State road, all the authority as to the alteration of tracks in State highways and the assessment of the expense of such alterations as is conferred upon the local board in the case of town and county ways. In the case, however, of State highways, the Commonwealth, by force of the statutes creating your commission and authorizing the building of State highways, takes the place of the municipality. The whole expense of the construction and maintenance of State highways is borne by the Commonwealth. The burden resting upon municipalities with respect to ways within their borders is taken from them so far as concerns State highways, and devolves upon the Commonwealth. The same considerations which, in the case of ordinary ways, lead to the conclusion that the expense of alteration of street railway tracks may be assessed upon the municipality as the party benefited, constrain me to the opinion that, when the Commonwealth takes the place of the municipality, it may be subject to the same assessment; particularly as the matter of assessment is in the hands of a commission representing the Commonwealth, charged with the duty of a maintenance of such ways, and which is granted annually an appropriation therefor.

This section, however, is limited in terms to the case where a street railway had already been constructed upon a way taken for the purpose of a State highway. The language of § 24 is so clear and unmistakable that I am unable to construe it as applying to street railways located upon State highways after the same have been constructed. The jurisdiction of the State Board over street railways so located is, as I have already had occasion to advise the Board, one of approval only. By St. 1897, c. 355, § 1, it is provided that: "No opening shall be made in any such road, nor any structure placed therein, nor shall there be made any change or removal of structures already placed therein, except with the approval of and in accordance with a permit from said commission, which shall exercise complete and permanent jurisdiction

over state highways." I have advised the Board that this statute did not and was not intended to take away the jurisdiction of the municipal board in the matter of granting locations for street railways in State highways. They are to pass, in the first instance, upon the question whether the convenience and necessity requires such a location; but their action, under the statute above quoted, is subject to the approval of your commission. See 1 Op. Atty.-Gen. 317, 489.

I find no statute conferring jurisdiction upon the State Board in the matter of the location and alteration of location of street railways in State highways, locations for which have been granted after the construction of the same as State highways. The result is that, under St. 1898, c. 578, § 24, in the case of railways, locations for which were granted upon State highways before the taking of the same by the Commonwealth, the sole jurisdiction as to change of location is in your commission; while, on the other hand, in the case of railways located upon a State highway *after* it has been constructed, the jurisdiction remains with the municipal board. I cannot think that this was the deliberate intent of the Legislature, and I submit to your Board whether it is not expedient to ask for additional legislation, to the end that this inconsistency may be removed.

In cases, however, where your commission has jurisdiction to alter the location of street railway tracks, to wit, where such tracks have been laid before the construction of a State highway, I am of opinion, for the reasons hereinbefore stated, that the commission may determine, in its discretion, that an alteration of the position of street railway tracks ordered by it in a State highway is for the benefit, in whole or in part, of the Commonwealth, and may therefore direct that the expense of such alteration shall be paid out of the appropriation made for the maintenance of such ways and to be expended under its direction. All the expenditures made by the commission for the maintenance of a State highway are made for the benefit of the public; and if the public are benefited by the alteration of street railway tracks more than the company whose tracks are altered, or if the public alone are benefited, and no benefit whatever accrues to the street

railway company, the commission may determine that the expense shall be borne, in such proportions as seem reasonable, by the Commonwealth and by the company; or, in the case last supposed, by the Commonwealth alone.

I have not overlooked the fact that one-fourth of the expense of the construction and maintenance of State highways is ultimately borne by the county in which such ways are located. St. 1894, c. 497, § 5. I am of opinion, however, that the meaning of this statute is that the county is to pay one-fourth of whatever expense may be lawfully incurred by your commission; and that this governs the expense of alteration of locations, so far as the same may be assessed upon the Commonwealth by your Board.

Upon the whole, therefore, I am of opinion that your commission, when it orders an alteration in the location of street railway tracks on a State highway, is authorized to assess the expense thereof upon the railway company or upon the Commonwealth (by payment therefor out of its appropriation) or upon both, in such proportions as it may determine.

INQUEST — STENOGRAPHER'S BILL — DISTRICT COURT JUDGE —
DISTRICT ATTORNEY.

A justice of a district court has no authority to employ a stenographer to report the evidence at an inquest held by him, at the expense of the county, except possibly in the case of an inquest into the conduct of an election, under St. 1898, c. 548, §§ 304-310.

District attorneys, by virtue of their general powers as prosecuting officers, may order the testimony taken at an inquest when crime is suspected, and written out for their subsequent use, at the expense of the county.

Your letter of April 11 requires the opinion of the Attorney-General upon the following questions: —

First. — “Is a county treasurer authorized to pay a stenographer's bill for services rendered in an inquest held by a justice of a district court when such bill is endorsed as examined and approved by such justice?”

Second. — “If the approval of the justice does not legalize the payment by the treasurer, does the additional approval by the district attorney so legalize?”

To the Con-
troller of
County
Accounts.
1899
December 18.

By St. 1896, c. 302, it is provided that: "When a justice has reason to believe that an inquest to be held by him relates to the death by accident of a passenger or employee upon a railroad, or of a traveler upon a public or private way at a railroad crossing, or to a death by accident resulting from or connected with the operation of a street railway, he shall cause a verbatim report of the evidence given before him to be made. The accuracy of such report shall be sworn to by the person making the same, and the report and the reporter's bill for his services, after each has been examined and approved in writing by such justice, shall be forwarded without unnecessary delay to the board of railroad commissioners. Bills for such services, when approved by the said board, shall be forwarded to the auditor of accounts, and shall be paid out of the treasury of the Commonwealth, and shall be assessed on the several corporations owning or operating the railroads or street railways on which the accidents occurred, and shall be collected in the manner provided in section twelve of chapter one hundred and twelve of the Public Statutes."

A similar provision was first enacted as to railroad companies by St. 1888, c. 365; and afterwards as to street railway companies by St. 1889, c. 154. These two statutes are consolidated in St. 1896, c. 302, above quoted. It is clear that as to such inquests a bill for the stenographic report of inquests is payable by the State Treasurer, when duly approved by the justice, and afterwards by the Board of Railroad Commissioners.

St. 1898, c. 548, §§ 304-310, provide for inquests into the conduct of elections in certain cases. In such cases § 307 authorizes the justice to employ a stenographer whenever he deems it necessary. Presumably the stenographer's bill in such cases is payable from the county treasury.

There is no other statute authorizing the employment of a stenographer by a justice holding an inquest; and the inference is very strong that where the statute does not specially authorize such employment the justice has no right to have the testimony taken at the expense of the county. If the general authority confided to him to conduct inquests included the power of employing a stenographer, there would be no occasion for the statutes above

referred to. Moreover, excepting as required by the district attorney for his use in conducting criminal prosecutions, there is no more occasion for the employment of a stenographer in an inquest than in any other trial before the justice.

I am of opinion, therefore, that a justice holding an inquest, excepting in cases where it is expressly authorized by statute, has no power to authorize the employment of a stenographer at the expense of the county.

It is otherwise with district attorneys. The duties of those officers are general in their nature, and may be said to comprise whatever in their discretion they may deem necessary for the prosecution of crime and the conviction of the criminal. It is often of the utmost importance, in cases of homicide, that the testimony before the justice at the inquest be accurately reported and preserved for future use. One of the principal purposes, indeed, of such inquests is to obtain evidence bearing upon the question of the homicide, and to secure and preserve the statements of persons who may be familiar with the circumstances, particularly of those who, by reason of their interest in the defendant, may later be unwilling to furnish evidence against him. No statute expressly authorizes the incurring of such expenses; but it would be, in my judgment, a serious impairment of the usefulness of a district attorney to require him to find a definite statutory authority for every expense necessarily incurred by him in prosecuting criminals and punishing crime. He is the direct representative of the people, and is responsible to them for the efficient performance of his duty to prosecute and convict persons guilty of offences against the law. It has certainly been the constant practice of district attorneys to employ stenographers to take testimony in inquests, and have the same written out for their use; and the assistance afforded by the testimony produced at the inquest has in many cases been of great value to the prosecution.

I am of opinion, therefore, that in his discretion the district attorney may direct that the testimony taken at an inquest where crime is suspected be taken stenographically, and written out for his use in the subsequent conduct of the case.

I do not deem it necessary to rely for this authority upon the provisions of Pub. Sts., c. 217, § 4, the language of which is: "All legal costs and expenses arising in criminal prosecutions, including the fees of grand and traverse jurors for travel and attendance therein, unless paid by the party prosecuted, shall be paid by the respective counties in which they occur." I am not at all sure that the fair construction of this language would include the expense in question. I prefer to rest my conclusions upon the general powers of district attorneys as above stated.

MEDICAL EXAMINER — BOND — CONDITION.

The bond of a medical examiner must be conditioned upon the "faithful performance of his duties."

Pub. Sts., c. 26, § 5, provides that a medical examiner, before entering upon the duties of his office, shall "give bond with sureties to the treasurer of the county, in the sum of five thousand dollars, for the faithful performance of such duties." It is not possible to misunderstand or misconstrue this provision. The condition of the bond must be the faithful performance of the duties of the office of medical examiner. I am of opinion that you should not accept any other form of condition. See 1 Op. Atty.-Gen. 229.

To the Con-
troller of
County
Accounts.
1899
December 20.

The form of a fidelity company bond, referred to in your letter, is not in compliance with the statute.

SAVINGS BANKS — AUTHORIZED INVESTMENTS — NET INDEBTEDNESS OF COUNTIES.

The net indebtedness of a county is not defined in St. 1894, c. 317, § 21, par. 2, cl. *f*, but, in accordance with the ordinary construction of the term, in computing the net indebtedness of a county, sinking funds available for the payment of such indebtedness are to be deducted.

Your letter of November 29 requires the opinion of the Attorney-General upon the proper construction of St. 1894, c. 317, § 21, par. 2, cl. *f*, the language of which is as follows: "The term 'net

To the Com-
missioners of
Savings Banks.
1899
December 21.

indebtedness' in this statute shall be construed to denote the indebtedness of any city, town or district, omitting debt created for supplying the inhabitants with water, and deducting the amount of sinking funds available for the payment of such indebtedness." Paragraph 2, cl. *d*, of the same section, authorizes savings banks to invest in the bonds or notes of any county in any of the New England States (excepting Massachusetts, as to which other provisions govern) whose net indebtedness does not exceed three per cent. of its valuation. The precise question raised by your letter is whether, under cl. *d*, notwithstanding the omission of the word "county" from cl. *f*, the net indebtedness of a county means the total indebtedness less sinking funds applicable to the payment of the same.

Pub. Sts., c. 116, § 20, par. 2, permitted savings banks to invest their funds in "the bonds or notes . . . of any city of the states of Maine, New Hampshire, Vermont, Rhode Island and Connecticut whose net indebtedness does not exceed five per cent. . . . or of any county or town thereof whose net indebtedness does not exceed three per cent." This chapter contains no definition of the term "net indebtedness." By St. 1883, c. 127, it was provided that: "The term 'net indebtedness,' used of city, town or district in any statute limiting or regulating the investment of sinking, trust and other funds of the Commonwealth, the deposits in savings banks and trust companies or other like funds shall be construed to denote the indebtedness of such city, town or district omitting debt created for supplying the inhabitants with water and deducting the amount of sinking funds available for the payment of such indebtedness." Whatever doubt may exist as to the determination of the question under consideration arises from the fact that the word "county" is not used in this statute; for it is obvious that the word "district" is not equivalent to and does not include a county. It undoubtedly refers to portions of municipalities incorporated for special purposes, like fire and water supply districts. St. 1894, c. 317, is a compilation of the existing statutes for the protection of savings banks; and the statute of 1883, above quoted, was incorporated in § 21, par. 2, cl. *f*.

It is to be observed, however, that the language of the section

incorporated into the act of 1894 is somewhat changed. The definition of "net indebtedness" in the act of 1883 was limited in terms to cases where that expression was used of a "city, town or district;" whereas in the compilation the definition is applicable to all cases where the term is used in that statute. Inasmuch, however, as the net indebtedness of a county is mentioned in the statute of 1894, if cl. *f* refers to or includes such net indebtedness of a county, the literal reading of the clause would define the net indebtedness of a county to be "the indebtedness of any city, town or district," etc. This is manifest absurdity. It is obviously necessary, therefore, to interpolate words to give to the paragraph meaning, so that it would read, "The term 'net indebtedness' in this statute [when used with reference to a city, town or district] shall be construed to denote," etc. If this be the correct construction of the section, it does not refer to the net indebtedness of counties. It thus appears that neither the statute of 1883 nor cl. *f*, where that statute is re-enacted, is intended to refer to or define the net indebtedness of a county.

Is there any significance in the omission of the word "county" from these statutes? In other words, did the Legislature intend that, while sinking funds applicable to the payment of debts should be deducted in the case of a city, town or district, they should not be so deducted in the case of a county? I have no hesitation in saying that I see no reason to suppose the Legislature so intended. The term "net indebtedness," as used in distinction from indebtedness, necessarily means the whole indebtedness, less funds on hand specially appropriated to the payment of such indebtedness. This is the popular and well-understood signification of the term.

Why, then, was the statute of 1883 limited in terms to cities, towns and districts? Clearly because the statute provided that, in computing the net indebtedness, debts incurred for the purposes of water supply were not to be reckoned. Cities, towns and districts may establish works for the supplying of their inhabitants with water, and borrow money therefor, even beyond the debt limit. Counties do not engage in the business of supplying water. The principal purpose, therefore, of the statute of 1883 was to

provide that water debts should not be reckoned in the total net indebtedness; and that part of the section which refers to the deduction of sinking funds is surplusage, unless it be supposed that the Legislature intended that, in computing the net indebtedness of cities, towns and districts, water debts should be omitted on the one side, and sinking funds applicable to water debts should be omitted on the other side.

Upon this construction of the statutes, and of the intention of the Legislature regarding the same, I have no difficulty in advising you that, for the purpose of computing the net indebtedness of a county, sinking funds appropriated to the payment of said indebtedness are to be deducted.

GYPSEY MOTH — AGENT TO INVESTIGATE PARASITES OF, OUTSIDE LIMITS OF COMMONWEALTH — GOVERNOR.

The Board of Agriculture may not send an agent to Europe to study the habits of the parasites of the gypsy moth with a view to their introduction into this country.

The Governor has no authority to appoint an agent for that purpose.

To the State
Board of
Agriculture.
1900
January 18.

Your letter of November 20, 1899, requires the opinion of the Attorney-General upon the question whether the Board of Agriculture has authority to send a person to Europe to study the habits of the parasites of the gypsy moth, with a view to their introduction into this country for the purpose of destroying the gypsy moth, in case it can be done with safety.

St. 1891, c. 210, § 1, defines the duty and authority of the State Board of Agriculture. It provides as follows: "The state board of agriculture is hereby authorized, empowered and directed to provide and carry into execution all reasonable measures to prevent the spreading and to secure the extermination of the ocnaria dispar or gypsy moth in this Commonwealth; and to this end said board shall have full authority to provide all necessary material and appliances, and to employ such competent persons, servants and agents as it shall from time to time deem necessary in the carrying out the purposes of this act."

I have heretofore advised one of the commissions appointed by the Governor, that, in the absence of express authority, it is not to be presumed that the Legislature has intended that its officers and servants should travel beyond the limits of the State. When such authority has been intended to be given, it has been conferred in express terms. 1 Op. Atty.-Gen. 382.

I am of opinion that the reasons which led to the opinion I have referred to require me to answer your question in the negative.

I know of no authority under which the Governor may appoint and send to Europe such an agent.

CIVIL SERVICE — VETERANS PREFERENCE ACT — ORIGINAL APPOINTMENTS — PROMOTION.

The provisions of St. 1896, c. 517, are applicable only to original appointments and to employment in the labor service. The repeal of the words "other qualifications being equal," however, in the sixth clause of § 14, c. 320, St. 1884, has the effect to require the preference of veterans in promotion, subject to the provisions in the same section that such promotions shall be on the basis of ascertained merit and of such examination as the Civil Service Commission may deem proper.

Your letter of December 14 requires the opinion of the Attorney-General upon the question whether the provisions of the Veterans Preference Act (St. 1896, c. 517) apply to promotions; and, if so, to what extent.

To the Civil
Service Com-
mission.
1900
JANUARY 27.

An examination of the civil service law (St. 1884, c. 320) shows that it is intended to deal with three distinct subjects, to wit: (1) the selection of persons to fill offices in the government of the Commonwealth and of the several cities thereof, which are required to be filled by appointment; (2) the selection of persons to be employed as laborers in the service of the Commonwealth; and (3) promotions in office. In no section of the statute does the word "appointment" appear to be used to include promotion.

Thus, § 2 provides that rules shall be prepared for the first two classes, to wit: the appointment of persons to office and the employment of persons as laborers. Section 14 provides that rules shall be made providing:—

First. — For the classification of “the offices and employments to be filled;”

Second. — For examinations by which to test “applicants for office, or for employment;” and

Fourth. — For “promotions in office.”

The sixth clause of this section distinctly distinguishes between appointments and promotions. It provides for “giving preference in appointments to office and promotions in office” to veterans.

Section 22 requires that the name of every person “appointed, employed or promoted,” etc., shall be reported to the commission.

Doubtless the expression “appointment to office” could be construed broadly enough to include promotions from one grade to another, if the context permitted such construction. In view, however, of all the provisions of the statute, some of which I have quoted above, I have no doubt that it was the intention of the Legislature to use the word “appointment” as applicable only to the original selection of persons for office, and to distinguish between such original selection and the promotion of persons already appointed to office under the civil service rules.

The existing Veterans Preference Act (St. 1896, c. 517), as to which my opinion is desired, relates, in terms, solely to appointments to office and employments in the labor service. No part of the law deals with promotions. I am of opinion that the word “appointment” is used, and is intended to be used, in the act in question in the same sense in which it was used in the original act. It follows that none of the provisions of the Veterans Preference Act relate to or are applicable to promotions.

But the repealing clause of the act provides that the words “other qualifications being equal” shall be stricken out from cl. 6 of § 14 of the civil service act. As originally enacted, the clause was as follows: —

Sixth. — For giving preference in appointments to office and promotions in office (other qualifications being equal) to applicants who served in the army or navy of the United States in time of war and have been honorably discharged therefrom.”

Inasmuch as this clause deals directly with promotions, it must, in my judgment, be regarded as having been the intention of the Legislature, by the repeal of the words above quoted, so far to modify the original statute as to require the giving of preference to veterans in terms.

The fourth clause, however, of the same section, requires that the commissioners shall provide in their rules "for promotions in office on the basis of ascertained merit and seniority in service and examination as may seem desirable." This clause must be construed in connection with cl. 6, requiring the rules to provide for preference to veterans in the matter of promotions. In other words, it is the duty of your commission, under the authority of these two clauses, taken together, to provide in your rules for promotions on the basis of ascertained merit and upon such examination as you may deem desirable, and, at the same time, to provide that veterans shall be preferred, whether they stand equally with other candidates or not.

So construed, the rules to be made as to promotions do not differ materially from those required for appointments to office under § 2 of the Veterans Preference statute. That section permits veterans to be preferred, but only in cases where they have shown themselves capable of filling the office in question after examination.

Replying specifically, therefore, to the question submitted in your letter, I have to say that I am of the opinion that the provisions of the Veterans Preference Act (St. 1896, c. 517) are, and are intended to be, applicable only to original appointments and employments in the labor service; but that the repeal of the words "other qualifications being equal," in the sixth clause of § 14 of the original statute, has the effect to require the preference of veterans in promotions, subject to the provisions in the same section that such promotions shall be on the basis of ascertained merit and of such examination as your Board may deem proper.

INSANE PERSONS — ESCAPE — DUTY OF SUPERINTENDENT OF
HOSPITAL TO RECAPTURE — DISCHARGE — TRUSTEES OF
STATE INSANE HOSPITAL.

It is the duty of the superintendent of a hospital to which an insane person has been committed by the court to retake such person if he escapes.

There is no statute or rule of law which limits the time within which such insane person may be legally retaken.

If the facts required by Pub. Sts., c. 87, § 40, are found to be true, a person who has been committed to the State Insane Hospital may be discharged by the trustees, whether he is at that time actually in custody or has escaped.

To the State
Board of
Insanity.
1900
January 27.

Your letter of January 9 requires the opinion of the Attorney-General upon the following questions, to wit: —

First. — Whether an insane person who has been lawfully committed to an insane hospital and has escaped therefrom may be lawfully apprehended and received back into said hospital without a new commitment;

Second. — Whether length of time affects the legality of such action; and

Third. — Whether the trustees have authority to discharge such insane person while his whereabouts are unknown to them.

First. — The commitment of a person to an insane hospital by a court of competent jurisdiction is based upon a finding by the court that the person so committed should by reason of his insanity be restrained of his liberty because the community would be in danger by reason of his being at large, or that his own welfare requires such commitment. The reasons which authorized the original commitment do not cease to operate because the person so committed has escaped; on the other hand, in most cases they are probably strengthened. The warrant of commitment prepared by virtue of St. 1898, c. 433, § 19, requires the superintendent to receive the patient into the hospital, "and there safely keep according to law." Moreover, Pub. Sts., c. 87, § 45, provides that the "expense of pursuing such pauper lunatics as escape" shall be, among other expenses, reimbursed to the trustees of the hospital.

I have no hesitation in advising you that it is not only the right of the superintendent, but his duty, to retake a person committed by the court, who has escaped.

Second. — There is no statute or rule of law that limits the time within which an insane person who has escaped may legally be retaken.

Third. — Pub. Sts., c. 87, § 40, provides, in substance, that any two of the trustees of the State Insane Hospital “may discharge any person confined therein, if it appears that such person is not insane, or, if insane, will be sufficiently provided for by himself, his guardian, relatives, or friends, or by the city or town liable for his support, or that his confinement therein is not longer necessary for the safety of the public or his own welfare.” Taken literally, this authorizes the discharge only of persons who are, in the words of the statute, “confined therein.” I am of opinion, however, that the statute is not to be taken so literally, and that, if the facts required by the statute are found to be true, the person who has been committed may be discharged, whether at the time he is actually in custody or has escaped.

INSURANCE — FOREIGN INSURANCE COMPANY — REINSURANCE — RESIDENT AGENT.

A foreign insurance company doing business in this Commonwealth is not required, in case it desires to reinsure a risk, to take out its policy of reinsurance by and through an agent resident in this Commonwealth.

St. 1894, c. 522, § 84, provides as follows: “Foreign companies admitted to do business in the Commonwealth shall make contracts of insurance upon lives, property, or interests therein only by lawfully constituted and licensed resident agents.”

To the Insurance Commissioner.
1900
February 6.

The last clause in the same section is as follows: “Whenever any company negotiating insurance effects a reinsurance of any part thereof, otherwise than through licensed resident agents, the entire tax thereon shall be paid by the original insuring company, and the tax commissioner shall make no deduction on account of such reinsurance.”

Your letter of December 28 requires my opinion upon the following question: “If a foreign insurance company, authorized to do business in Massachusetts, issues a policy on property, lives or interests in this Commonwealth, which for any reason it desires

to reinsure, must such company take out its policy of reinsurance by and through an agent resident in this Commonwealth, and must the policy of reinsurance be issued by such licensed resident agent?"

I am of opinion that a foreign insurance company doing business in Massachusetts is not required, in case it desires to reinsure a risk, to take out its policy of reinsurance by and through an agent resident in this Commonwealth. I base this conclusion upon a number of considerations, among them the following: —

The first clause of § 84, as above quoted, was originally enacted in St. 1887, c. 214, § 84. The last clause was first enacted in St. 1888, c. 154, § 1. Upon the codification of the insurance laws the two clauses were put in the same section. The fact that the last clause was enacted after the first clause became a law indicates the intention of the Legislature that the first clause should not apply to reinsurance, as it plainly contemplates that contracts of reinsurance may be made "otherwise than through licensed resident agents."

Furthermore, I am of opinion that the word "reinsurance," as used in the latter clause, is not intended to signify or include original insurance. The word "insurance" is defined in St. 1894, c. 522, § 3, as amended by St. 1897, c. 66, as "an agreement by which one party, for a consideration, promises to pay money or its equivalent or to do some act of value to the assured upon the destruction, loss or injury of something in which the other party has an interest." While it would be possible to hold that this definition covers reinsurance by one company of a risk taken by another, it is not necessary so to strain the definition, especially in view of the fact that the words "insurance" and "reinsurance" are both used in the same connection in the clause in question.

The purpose for which the latter clause was enacted points to the same conclusion. Insurance companies were by Pub. Sts., c. 13, § 33, required to pay a franchise tax based upon the amount of premiums received by them, deducting unused notes given for premiums, return premiums on cancelled policies, and the sums actually paid to other insurance companies incorporated under the laws of the Commonwealth, or to the agents of foreign companies for reinsurance. But, as it might be difficult for the taxing officer

to verify the amounts so claimed to have been paid to a foreign insurance company for reinsurance, the clause in question was enacted as an amendment of § 33, with the obvious purpose of obviating such difficulty in case reinsurance is obtained otherwise than through licensed resident agents. If the reinsurance is obtained through a licensed resident agent, the amount so paid can be readily ascertained and deducted from the original premium for the purpose of the tax. If, however, companies see fit to reinsure directly from the home office, the tax is imposed upon the entire original premium, leaving the parties effecting such reinsurance to apportion the tax among themselves as they see fit.

BOSTON & ALBANY RAILROAD COMPANY — LEASE — CORPORATION — CHARTER — RIGHTS OF COMMONWEALTH TO REGULATE TRAFFIC AND ACQUIRE PROPERTY OF RAILROAD — CONSTITUTIONAL LAW — IMPAIRING OBLIGATION OF CONTRACT — INTERSTATE COMMERCE — WAIVER — ASSIGNMENT OF LEASE — PUBLIC POLICY — HOUSE OF REPRESENTATIVES — ATTORNEY-GENERAL.

The House of Representatives has no authority to fix a limit of time within which the Attorney-General shall discharge his statutory duty of advising the General Court, or either branch of it.

The Boston & Albany Railroad Company, incorporated under the laws of both New York and Massachusetts, is, so far as the restrictions, duties and obligations imposed upon the Boston & Worcester Railroad Company and the Western Railroad Company, its constituent domestic corporations by their charters, are concerned, within and subject to the jurisdiction of the Commonwealth as though it were incorporated wholly under the laws of Massachusetts.

The jurisdiction of the State to regulate rates of traffic is limited to such traffic as begins and ends within its borders.

The charters of the Boston & Worcester Railroad Company and the Western Railroad Company contained a contract whereby the Commonwealth agreed that it would not exercise its power of regulating rates of traffic so as to reduce the profits below ten per cent. per annum. The obligation of this contract subsists, notwithstanding the provision of Pub. Sts., c. 112, § 180, that traffic rates shall at all times be subject to alteration by the Legislatures, unless the corporation has waived its right under its original charters.

By accepting the benefit of legislation giving it additional privileges during the existence of general laws inconsistent with its original charters, the corporation has subjected itself to all the provisions of such general laws. The Commonwealth, therefore, has the right to regulate the rates on the Boston & Albany Railroad, although dividends are thereby reduced below eight per cent. per annum.

The Legislature may reserve this right to the Commonwealth, while ratifying the proposed lease of the Boston & Albany Railroad to the New York Central & Hudson River Railroad Company.

The Commonwealth may acquire the property of the Boston & Albany Railroad either by eminent domain or by purchase. The compensation in the first case would be the fair net cash value of the property taken, which would include only the property necessary to the carrying on of the railroad business; in case of purchase, the Commonwealth must pay such sum as would reimburse to the road the "cost of making the railroad," with a net profit thereon of ten per cent. a year.

If the Commonwealth assents to the proposed lease, it does not expressly or by implication waive or surrender any rights reserved to it under existing laws. The sum of \$5,600,000, the proceeds of property belonging to the lessor sold by it to the lessee, should be deducted from the damages in case of taking, and from the price to be paid in case of purchase.

Questions of public policy are peculiarly within the province of the Legislature, and the Attorney-General is not authorized to express an opinion upon them.

The bonds acquired by the Boston & Albany Railroad under the terms of the lease and agreement, when ratified by the Commonwealth, will become the absolute property of the corporation; and the interest of the bonds may be divided among the stockholders, or the bonds may be sold and the proceeds divided.

The lessee under the proposed lease has no authority to assign its lease or to underlet the lines of the Boston & Albany Railroad or any of the branches acquired by the lease. Such lease, though it may be annulled by the joint action of the contracting parties, cannot be modified, changed or amended by them without the consent of the Commonwealth.

But *quære*, as to the remedy of the Commonwealth if the lessee should assign the lease.

Such obligations as are now incumbent upon the Boston & Albany Railroad under the Public Statutes will continue in full force under the proposed lease. The duty of complying with the provisions of St. 1893, c. 131, will fall upon the lessee, and not upon the lessor.

It is not within the jurisdiction of the House of Representatives to require the Attorney-General "to prepare and furnish" to it "a list of all the special legislation affecting the Boston & Albany Railroad," such order not being a question of law within the meaning of Pub. Sta., c. 17, § 7.

To the House
of Representa-
tives.
1900
March 16.

I have the honor to acknowledge the receipt of two orders adopted by the House of Representatives, respectively on the thirteenth and fourteenth days of February last, requiring the opinion of the Attorney-General upon certain questions therein stated.

The orders purport to require the Attorney-General to return his answers to the questions submitted on or before March 15, 1900. The Honorable House of Representatives is doubtless aware that it has no authority to fix a limit of time within which the Attorney-General shall discharge his statutory duty of advising the General Court, or either branch thereof, under the statutes

of the Commonwealth. In deference, however, to the expressed wishes of the House of Representatives, as indicated by the limitation of time set forth in the orders, I have given such immediate consideration to the questions submitted as the other duties of this office have permitted, with a view to complying, so far as practicable, with the wishes of your Honorable body.

Some general considerations affecting all the questions may properly be stated before proceeding to answer them in detail.

1. The Boston & Albany Railroad Company is a corporation formed by the consolidation, under authority of St. 1867, c. 270, of the Boston & Worcester Railroad Corporation, incorporated by St. 1831, c. 72, and the Western Railroad Corporation, incorporated by St. 1833, c. 116. By St. 1869, c. 461, it was further authorized to unite and consolidate with itself in one corporation the Albany & West Stockbridge Railroad Company and the Hudson & Boston Railroad Corporation, incorporated under authority of and existing in the State of New York, under the name of the Boston & Albany Railroad Company. Legislation authorizing such a consolidation was also enacted in New York (N. Y. St. 1869, c. 917).

Under these statutes two corporations were created, one being the Boston & Albany Railroad Company, incorporated under authority of the statutes of Massachusetts, and the other being the Boston & Albany Railroad Company, incorporated under the statutes of New York. Both corporations were, and are, composed of the same persons and governed by the same officers. Together they acquired the ownership and control of, and have continued to own and control, a railway line extending from Boston to Albany.

The effect of such a dual organization and the relative rights and jurisdiction of the several States under which it exists have been considered in many cases, both in the federal and State courts. I discussed the matter somewhat fully in an opinion given to the Senate and House of Representatives concerning the legality of the lease of the Old Colony Railroad Company to the New York, New Haven & Hartford Railroad Company, submitted March 16, 1894 (1 Op. Atty.-Gen. 118), in which I reached the

conclusion, and so advised the Senate and House of Representatives, that, so far as concerned their relations to the sovereignty, they were two corporations; but that, so far as concerned the ownership of their property, the carrying on of their business and their relations to the public, they constituted, to all intents and purposes, one corporation, each, nevertheless, owing allegiance to the State granting its charter, and governed by the laws of such State in matters exclusively within its jurisdiction.

It has been suggested that, in consequence of this dual incorporation, the Commonwealth has lost some of the rights which it may have had over the corporations of which the consolidated corporation was composed. Under the New York statute, however, authorizing the consolidation (N. Y. St. 1869, c. 917), it was expressly provided that "such act of consolidation shall not release such new corporation from any of the restrictions, disabilities or duties of the several corporations so consolidated." Similar provisions were contained in the Massachusetts statutes. If, therefore, any such restrictions, duties or obligations were contained in the special acts referring to the consolidated corporations in Massachusetts, or in general laws applicable to such corporations, I deem them to have been continued and to remain in force as to the consolidated corporation; and am of the opinion that the consolidated corporation is, so far as concerns the restrictions, duties and obligations imposed upon the constituent domestic corporations by their charters, within and subject to the jurisdiction of the Commonwealth of Massachusetts, as though it were incorporated only under the laws of this Commonwealth.

2. It is to be observed, further, that, under the construction given by the federal courts to the commerce clause of the Constitution of the United States, and the interstate commerce laws enacted by Congress under authority thereof, the jurisdiction of a State to regulate rates of traffic is limited to such traffic as begins and ends within the State, and that it has no authority to regulate traffic beginning within the State and ending without the State, or *vice versa*, or traffic beginning and ending without the State. It cannot even regulate local traffic with reference to the revenues received by the railroad from interstate traffic, or impose upon inter-

state traffic an undue portion of the burden of operating expenses, so that a loss which may be incurred by the corporation from local traffic is left to be made up by the profits of interstate traffic. Consequently, whatever is hereafter said with reference to the regulation of rates of traffic by the Commonwealth is to be taken to refer to such traffic only as is within the jurisdiction of the Commonwealth.

Having in view these considerations, I beg to reply to the questions submitted as follows: —

1 (order of February 13). “Does the Commonwealth, under existing laws and charters, have the right to reduce rates on the Boston & Albany Railroad, if thereby dividends are reduced below eight per cent. per annum?”

In order intelligently to consider this question, it is necessary to review the legislation of the Commonwealth looking to the regulation of rates of traffic, so far as the same are applicable to the Boston & Albany Railroad Company.

The charter of the Boston & Worcester Railroad Company (St. 1831, c. 72) contained the following provision, to wit: —

SECTION 5. *Be it further enacted*, That a toll be, and hereby is granted and established, for the sole benefit of said corporation, upon all passengers and property of all descriptions which may be conveyed or transported upon said road, at such rates per mile as may be agreed upon and established from time to time by the directors of said corporation. The transportation of persons and property, the construction of wheels, the form of cars and carriages, the weight of loads, and all other matters and things in relation to the use of said road, shall be in conformity to such rules, regulations and provisions, as the directors shall from time to time prescribe and direct, and said road may be used by any persons who shall comply with such rules and regulations: *provided, however*, that if, at the expiration of ten years from and after the completion of said road, the net income or receipts from tolls, and other profits, taking the ten years aforesaid as the basis of calculation, shall have amounted to more than ten per centum per annum upon the cost of the road, the Legislature may take measures to alter and reduce the rate of tolls and other profits, in such manner as to take off the overplus for the next ten years, calculating the amount of transportation upon the road to be the same as the ten preceding years; and at the expiration of every ten years thereafter, the same proceedings may be had; *provided, further*, that the legislature

shall not at any time, so reduce the tolls and other profits as to produce less than ten per centum upon the cost of the said railroad, without the consent of said corporation.

This statute was enacted June 23, 1831. The charter of the Western Railroad Company contained a section identical in its provisions with that contained in the charter of the Boston & Worcester Railroad Corporation above quoted. This charter was enacted in 1833 (St. 1833, c. 116).

Shortly before these charters took effect, however, a general law was enacted (St. 1831, c. 81, approved March 11, 1831), which provided that "all acts of incorporation which shall be passed after the passage of this act, shall at all times hereafter be liable to be amended, altered or repealed at the pleasure of the legislature, and in the same manner as if an express provision to that effect were therein contained; unless there shall have been inserted in such act of incorporation, an express limitation as to the duration of the same."

This provision has continued in force substantially to the present time, and is now § 3 of c. 105 of the Public Statutes.

The question thereupon at once arises whether this general law, subjecting all special charters thereafter enacted to amendment or repeal at the pleasure of the Legislature, is to be regarded as reserving to the Legislature the right to amend the provisions of § 5 of the charter of the railroad company, above quoted. There can be no doubt that as a general rule the statute above quoted, reserving to the Legislature the right to amend, alter or repeal charters, is to be regarded as being incorporated in subsequent charters, governing and limiting their provisions. On the other hand, however, it is equally certain that the Legislature may grant a charter which shall not be subject to the provisions of this general law. No Legislature can bind its successor; and it is clearly within the power of the General Court to enact a law containing an unalterable contract, notwithstanding the restraining provisions of a prior general statute like the one in question. A striking illustration of the exercise of this power is to be found in St. 1897, c. 500, relating to the Boston Elevated Railway Company.

There is much ground for the contention that the prior general law, reserving to the Legislature the right to repeal or amend all charters subsequently granted, is to be regarded as incorporated by implication into every subsequent charter, controlling it to the extent that, however absolute its provisions, they are enacted subject to the right of amendment by the Legislature. The question has been more than once discussed by the Supreme Judicial Court, but never determined; and it may be that when it becomes necessary the court may adopt the construction suggested. Should it be so held, there is nothing to prevent the Legislature from regulating rates of traffic upon the Boston & Albany Railroad, excepting certain general constitutional restrictions upon its authority, which will be hereafter considered.

Inasmuch, however, as the Honorable the House of Representatives is entitled to the opinion of the Attorney-General, however difficult or uncertain the question submitted, I am constrained to say that in my opinion the section relating to tolls and fares, above quoted, in the charter of the Boston & Worcester Railroad Company, was intended to constitute, and did constitute, a contract between the Commonwealth and the railroad company, which could not be annulled except by the waiver or consent of the company. The same is true of the similar provisions in the charter of the Western Railroad Company. At the time these charters were granted, railroad transportation was in its infancy. Experience furnished no guide as to the probable profits which might accrue from such methods of transportation. The section in question was obviously a declaration by the Legislature that ten per centum upon the cost of the road should be regarded as a reasonable compensation, and the section in question so declared. It provided, upon the one hand, that from time to time rates of traffic might be regulated so as to reduce the profits of the company to ten per centum, and, on the other hand, that such regulation should not reduce profits below that figure. In consideration, therefore, of the reservation of authority to regulate fares so as to reduce profits to the percentage named, the Commonwealth agreed that it would not exercise its power of regulation so as to reduce such profits below that amount. This,

being accepted by the company, clearly amounted to a contract. The fact that the estimate of reasonable and proper profits was a large one, and that consequently the bargain turned out to be an improvident one on the part of the Commonwealth, does not alter the question. Being such a contract, the State became subject to the provisions of the Constitution of the United States, that no State shall pass any law impairing the obligation of contracts.

The next inquiry is, whether this law has been amended or repealed by the consent, express or implied, of the corporation. The Revised Statutes, in c. 39, § 83, provided substantially that the Legislature might regulate rates of toll upon any railroad, but with the proviso that such tolls should not be reduced so as to produce less than ten per centum per annum net profit to the corporation. The language of this section differs somewhat from the provisions of the charters of the railroad in question; but as, in my opinion, it could not operate to repeal the provisions of the charters, it is unnecessary to consider it further.

The provisions of the Revised Statutes remained substantially in force as the law of the Commonwealth until 1870, when in consequence of the recommendation of the Railroad Commissioners, it was provided (St. 1870, c. 325, § 1) that "any railroad corporation may establish for its sole benefit, fares, tolls and charges upon all passengers and property conveyed or transported on its railroad, at such rates as may be determined by the directors thereof, and may from time to time, by its directors, regulate the use of its road: *provided*, that such rates of fares, tolls and charges and regulations, shall at all times be subject to revision and alteration by the legislature, or such officers or persons as the legislature may appoint for the purpose, anything in the charter of any such railroad corporation to the contrary notwithstanding." This section has continued in force as the law of the Commonwealth until the present time, and is incorporated in the Public Statutes as c. 112, § 180.

This was clearly an attempt by the Legislature to repeal all charter provisions limiting the power of the Legislature to regulate rates of traffic. But, for the reasons I have already stated, I am of opinion that it was ineffectual to repeal any such limitations as

amounted to a contract between the Commonwealth and a corporation, like the sections in the charters of the Boston & Worcester Railroad Company and the Western Railroad Company, relating to their right to regulate tolls, if those sections were then still in force.

I have examined with some care all the provisions of the statutes, general and special, prior to the year 1870, relating not only to the Boston & Worcester Railroad Company and to the Western Railroad Company, but to the other corporations which, by consolidation with it, became the Boston & Albany Railroad Company; and I do not find therein anything which can, in my judgment, be regarded as a waiver of the contract on the part of the railroad company. On the contrary, all the statutes so enacted appear clearly to have preserved, and to have intended to preserve, the special rights and contracts secured to it under its charter.

In my opinion, therefore, the provisions limiting the authority of the Legislature to regulate rates of traffic on the Boston & Albany Railroad Company, contained in the charters of the companies from which it was formed, remained in force and binding upon the Commonwealth until the statute of 1870.

It remains to consider whether anything has happened since that time to bring the corporation within the provisions of the laws giving to the Legislature full authority to regulate rates of traffic on railroads within its jurisdiction. There can be no doubt that the corporation may waive its right under the original charter, and subject itself to the provisions of the general laws. If it has accepted the benefit of legislation giving it important additional rights and privileges granted during the existence of general laws which are inconsistent with its original charter, the acceptance of such grants and privileges may well be deemed to be a consent that it shall be governed by such laws rather than by the terms of the original contract, entered into under different conditions and different laws.

I find that since the year 1870 many such statutes have been enacted. The most striking instance of such legislation is perhaps St. 1889, c. 163, authorizing the Boston & Albany Railroad

Company to increase its capital stock by an amount not exceeding ten millions of dollars, and authorizing a capital of thirty millions of dollars in the whole. This act was accepted by the company, and its capital stock has been increased, although not to the full amount authorized by the act.

What was the effect of the acceptance of this act (and other like acts) by the company? When it was enacted, the general laws of the Commonwealth (St. 1870, c. 325, § 1, re-enacted in St. 1874, c. 372, § 179, now Pub. Sts., c. 112, § 180) gave to the Commonwealth the power to regulate rates and fares without regard to the amount of dividends to be earned upon the capital stock of railroad corporations, and declared that this right should be reserved to the Commonwealth, anything in the charter of any railroad company to the contrary notwithstanding. The corporation might have continued to stand upon its original charter and to adhere to the terms of its original contract; but, when, under general laws inconsistent with its charter, it accepted a grant of additional capital, it must be taken, in my judgment, to have accepted such grant subject to the general laws applicable to the increased capital stock so granted. The charter of a railroad corporation is not merely the original act, but all the acts passed with reference to the corporation. I find no difficulty, therefore, in reaching the conclusion that, at least as to such additional stock, there existed no right to the corporation to earn upon it a ten per cent. dividend; and that, as to such additional stock, the provisions of the original charter are inapplicable.

It may be contended, however, that, even if it be conceded that stock issued under the authority of laws in force after 1870 must be taken to be subject to the general laws then in force, the rights of the original stockholders, for whose benefit the original charter was granted, are still preserved. But it is difficult if not impossible, to separate the corporation, which has accepted the benefit of general laws enacted since 1870, from its stockholders or any part of them, or to classify those stockholders so that a portion have rights that others do not have. Such a distinction is not possible. The different issues of stock have not been kept distinct. The

holder of a share of the Boston & Albany Railroad stock of to-day has no way of knowing whether the share was part of the original issue or of some increase; nor would the corporation itself, if such a distinction should be attempted, have any method of determining who among its shareholders are entitled to the benefits of its original charter and who are subject to the provisions of the general laws. It would, moreover, be unreasonable to suppose that it was the intention of the Legislature, or even the corporation, that there should be a distinction between increased stock, so that original stock should have the right to earn ten per cent. dividends, while as to stock authorized after the statute of 1870 the Legislature may regulate rates of traffic so that it could not earn that amount. Such a division of profits would be impracticable.

I am of opinion, therefore, that, when the corporation accepted the benefit of statutes enacted in its favor by the Commonwealth, which were in fact amendments of original charter, it brought itself within the provisions of its general statutes in force at the time of such amendments, even though those statutes were inconsistent with its original charter.

There are no direct adjudications by the court on this question; but in *Attorney-General v. Old Colony Railroad*, 160 Mass. 62, Field, C.J., in delivering the opinion of the majority of the court, says (p. 85): "In view of the many changes in the charters of nearly all the railroad corporations of the Commonwealth occurring since the year 1870, which have been accepted by the corporations, it may well raise a doubt whether these corporations have not consented to be subject to any laws which the Legislature, under its general powers, may constitutionally enact concerning fares or tolls." In the same case, Knowlton, J., delivering the opinion of the minority, says (p. 95): "By St. 1870, c. 325, § 1, . . . the Legislature terminated the right of these railroad corporations to go on expending money and increasing the cost of their railroads under a contract which permitted them, without the possibility of legislative interference, to charge fares which would give them an income of ten per cent. on the cost of the road, if such a right had previously

existed." These extracts, while not to be taken as determining definitely the question under discussion, may yet be said to indicate clearly the views of the court in the matter; and I have little doubt that, if the question were directly presented, the Supreme Judicial Court would have no difficulty in coming to the conclusions above indicated.

Assuming, therefore, that there are no special restraining statutes now in force, the Boston & Albany Railroad Company is subject to the general statutes (Pub. Sts., c. 112, § 180) authorizing the Legislature to fix tolls. There is no doubt of the constitutionality of the statute. The only limitation upon the power of the Legislature is that rates shall not be fixed so low as entirely to deprive the corporation of any profitable use of its property. In other words, they must be such as to permit the corporation to earn a reasonable profit. What is a reasonable profit must be finally determined by the courts. It can scarcely be questioned however, that a profit of something less than eight per cent. per annum would be a reasonable profit.

I am of opinion, therefore, that the Commonwealth, under existing laws and charters, has the right to reduce the rates on the Boston & Albany Railroad, if thereby dividends are reduced below eight per cent. per annum.

2 (order of February 13). "If so, would such right be in any way impaired by the Commonwealth's ratifying the proposed lease of the Boston & Albany Railroad to the New York Central & Hudson River Railroad Company; and, if so, in what manner and to what extent?"

In the absence of any limitation upon the consent of the Commonwealth, I am of opinion that, having authorized the imposition of the burden of rentals equivalent to an eight per cent. dividend upon the stock of the Boston & Albany Railroad, subsequent legislation so fixing traffic rates of the leased railroad as will make it impossible for the lessee to earn the amount so fixed would be a violation of that clause of the Fourteenth Amendment which forbids a State to deprive a person or corporation of property without due process of law, and would therefore be beyond the power of the Commonwealth.

I have examined, however, House Bill No. 36, which is the bill with reference to which the questions submitted by the Honorable House of Representatives relate; and I am of opinion that, under the second section of said bill, the right is reserved to the Commonwealth to fix rates to the extent and in the manner now enjoyed notwithstanding the proposed lease. Such a reservation is clearly within the power of the Legislature, and is binding upon the parties to the lease.

3 (order of February 13). "By what method or methods, and at what probable price, under existing laws and charters, could the Boston & Albany Railroad be bought by the Commonwealth on March 1, 1900?"

1 (order of February 14). "What are the rights of the Commonwealth in the matter of taking, by purchase or otherwise, the property and franchises of the Boston & Albany Railroad Company; how much would such purchase or taking cost the Commonwealth; and how and to what extent would those rights and said cost be changed, if at all, by the ratification of the lease as proposed in the bill now before the General Court?"

The foregoing questions may conveniently be considered together.

There are two ways in which the Commonwealth may acquire the property of the Boston & Albany Railroad Company, to wit, by taking or by purchase.

The Commonwealth has the undoubted right to take the property of any individual or corporation, including a railroad corporation, for public uses. Under the authority of the Constitution the Commonwealth may at any time take the property of the Boston & Albany Railroad, if the public exigencies so require, paying therefor a reasonable compensation. This compensation is the fair net cash value of the property taken. Such a taking by right of eminent domain would not, in my opinion, include the cash assets or choses in action of the corporation, but only the property necessary to the carrying on of the railroad business. On the other hand, it would not impose upon the Commonwealth any obligation to assume or pay the indebtedness of the corporation. This must be discharged by the corporation out of the

damages recovered by it for the taking. The same rules would govern the compensation to be paid upon such taking as are applicable to any case of any taking by right of eminent domain. The cost of the property, its condition, its earning capacity, its prospective value, and perhaps other elements, would be proper matters to be considered in arriving at its value.

Pub. Sts., c. 112, § 8, expressly enacts that the Commonwealth may at any time "take and possess the road, franchise and other property of a railroad corporation after giving to it one year's notice in writing; and shall pay therefor such compensation as may be awarded by three commissioners, to be appointed by the supreme judicial court, who shall be sworn to appraise the same justly and fairly, and shall estimate and determine all damages sustained by it by such taking; and a corporation aggrieved by the determination of said commissioners may have its damages assessed by a jury of the superior court in the county of Suffolk, in the same manner as is provided by law with respect to damages sustained by reason of the laying out of ways in the city of Boston." This section, however, is merely declaratory of the rights secured to the Commonwealth under the Constitution, and cannot be said to enlarge or diminish those rights.

Another method by which the Commonwealth may acquire the property of the Boston & Albany Railroad Company is by purchase under the authority of general or special statutes. This right of purchase differs inherently from the constitutional authority to take property by right of eminent domain, in that it is conferred by a contract contained in the statute, may be exercised regardless of public exigencies, and the price to be paid is fixed by the statute.

The charter of the Boston & Worcester Railroad Company provides, in St. 1831, c. 72, § 14, as follows: "It shall be in the power of the government, at any time during the continuance of the charter hereby granted, after the expiration of twenty years from the opening for use of the railroad herein provided to be made, to purchase of the said corporation the said railroad and all the franchise, property, rights and privileges of the said corpora-

tion, on paying therefor the amount expended in making said railroad, and the expenses of repairs and all other expenses relating thereto, with interest thereon at the rate of ten per cent. per annum, deducting all sums received by the corporation from tolls or any other source of profit, and interest at the rate of ten per cent. per annum thereon, that shall have been received by the stockholders." By St. 1832, c. 153, relating to the same corporation, this right was modified in favor of the railroad corporation, so that the amount to be deducted from the interest to be paid on the cost of making the railroad should not in any event exceed ten per cent. per annum, the original section requiring the deduction of all amounts received even if the same amounted to more than ten per cent. per annum.

The charter of the Western Railroad Company (St. 1833, c. 116) contained a provision relating to the purchase of the Western Railroad Company by the Commonwealth. It was similar in all respects to St. 1832, c. 153, above referred to, relating to the purchase of the Boston & Worcester Company. A subsequent statute superseded the provisions for purchase contained in the original charter. By St. 1839, c. 70, the Commonwealth authorized an issue of scrip to aid in the construction of the Western Railroad Company. Section 5 of this statute provided as follows: "The Commonwealth may, at any time after this act shall take effect, purchase of the said corporation the said Western Railroad, and all the franchise, property, rights and privileges of said corporation, by paying them therefor such a sum as will reimburse them the amount of capital paid in, with a net profit thereon of seven per cent. per annum, from the times of the payment thereof by the stockholders, to the time of such purchase. And if, on said purchase, the Commonwealth shall have paid, or shall then pay or assume to pay the scrip issued by them by virtue of this act, or of the act passed the twenty-first day of February, in the year one thousand eight hundred and thirty-eight, or any part thereof, the amount which they shall have so paid, or shall pay or assume, shall not be deemed to be a part of the cost of the road, or of the capital paid in, for which the Commonwealth shall pay a net profit

as above; excepting, however, such part of said scrip as the said corporation shall, at the time of such purchase, have actually paid."

It is to be observed that the words relating to the price to be paid in the original charter were "the amount expended in making said railroad;" whereas in the act of 1839 the language was "the amount of capital paid in." Upon consideration, however, of all the provisions of § 5 above quoted, I am of opinion that the two expressions were intended by the Legislature to be identical, and to mean the amount of money actually expended by the stockholders in the construction of the railroad. Section 5, which designates the amount to be paid as "capital paid in," further provides that, in case the railroad is purchased by the Commonwealth, and its scrip is outstanding, and is assumed by the Commonwealth, the amount of scrip so outstanding "shall not be deemed to be a part of the cost of the road, or of the capital paid in, for which the Commonwealth shall pay a net profit as above; excepting, however, such part of said scrip as the said corporation shall, at the time of such purchase, have actually paid." From these words it is obvious that by the use of the word "capital" in St. 1839, c. 70, the amount which the Commonwealth was to pay for the purchase of the road was intended to be the actual amount expended by the stockholders either from the proceeds of shares issued, or in repaying the loan of the Commonwealth made for that purpose.

By St. 1867, c. 270, the Boston & Worcester Railroad Company and the Western Railroad Company were authorized to consolidate into one corporation, the corporation so formed to be called the Boston & Albany Railroad Company. Section 4 of this statute provides as follows: "If any such consolidation takes place as is provided in the first and third sections of this act, the corporation so formed shall have, hold, possess and enjoy all the powers, privileges, rights, franchises, property, claims, demands and estates which, at the time of such union, may be held and enjoyed by either of the said existing corporations, and be subject to all the duties, restrictions, obligations, debts and liabilities to which, at the time of the union, either is subject in severalty."

Section 17 of the same act provides: "The Commonwealth may at any time purchase of the Boston & Albany Railroad Company its road and all its franchise, property, rights and privileges, by paying therefor such sum as will reimburse it the amount of capital paid into the several corporations composing it, and to the Boston & Albany Railroad Company, with a net profit thereon of ten per cent. a year, from the times of the payment thereof by the stockholders of said corporations respectively, to the time of the purchase."

It might well be that, under the language of § 4, above quoted, the Commonwealth could claim the right to purchase so much of the consolidated company as had formerly been owned by the Western Railway Company, by paying it such a sum as would reimburse it the amount of capital paid in with a net profit thereon of seven per cent. interest, were it not for the special provision set forth in § 17 of the same act. The provisions of § 17, however, amounted to a new contract between the consolidated corporation and the Commonwealth, and superseded the contractual rights previously existing between the Commonwealth and the defunct Boston & Worcester and Western Railroad companies.

The language relating to the price to be paid, in the charter of the Boston & Worcester Railroad Company, was "the amount expended in making said railroad and the expense of repairs, and all other expenses relating thereto." In the statute of 1832, modifying the provisions of the original charter, and in the charter of the Western Railroad Company, the language again was "the amount expended in making said railroad." The language in St. 1839, c. 70, above referred to, relating to the Western Railroad Company, was "such a sum as will reimburse them" (the corporation) "the amount of capital paid in." Substantially the same phrase was used in St. 1867, c. 270, which provided for the payment of "such sum as will reimburse it the amount of capital paid in."

In view of the fact, as before stated, that it was contemplated that the roads when built should be paid for out of the capital stock of the company, I have no reasonable doubt that all the

phrases quoted have substantially the same meaning; and that it was the intention of the Legislature that the Commonwealth in the event of purchase should be required to pay to the corporations all moneys expended in the construction of the railroad and its equipment. It would be unreasonable to hold that the Commonwealth could acquire the property of a railroad company built in part by the proceeds of money borrowed therefor under authority of the Commonwealth, and pay only such portion of the cost as would be represented by the capital stock, leaving the corporation to discharge its own indebtedness. The words "capital paid in," therefore, in St. 1867, c. 270, § 17, are not to be taken as equivalent to the amount of capital stock outstanding, but signify the whole amount expended by the corporation in the construction and equipment of its railroad.

In addition to the special legislation upon the subject, the general laws provide a method by which the Commonwealth may purchase any railroad within its jurisdiction. Pub. Sts., c. 112, § 7, is as follows: "The Commonwealth may at any time during the continuance of the charter of a railroad corporation, after the expiration of twenty years from the opening of its road for use, purchase of the corporation its road and all its franchise, property, rights and privileges, by paying therefor such sum as will reimburse to it the amount of capital paid in, with a net profit thereon of ten per cent. a year from the time of the payment thereof by the stockholders to the time of the purchase."

This section was first enacted in substantially the same form in Rev. Sts., c. 39, § 84, and was practically contemporaneous with the early special statutes upon the subject of purchase. I am of opinion, therefore, for the reasons already stated, that the expression "capital paid in" in this section does not mean simply the amount of capital stock outstanding, but that it is to be construed like similar expressions in the special statutes, as meaning the net amount expended in the construction of the road and its equipment, whether raised by issue of shares or by loans. This being so, the section of the Public Statutes under consideration does not differ essentially from the provisions imposed in the consolidation statute of 1867 relating to the Boston & Albany Rail-

road; and what I have said in reference to the construction of the special statute applies in all respects to the general provision above quoted.

The amount to be paid for the Boston & Albany Railroad in case of purchase may be stated, therefore, as follows: the Commonwealth must pay such a sum as will reimburse the road the "cost of making the railroad," with a net profit thereon of ten per cent. a year. For the purpose of this computation, it is of no consequence whether this cost was paid from the proceeds of shares, or from bonds issued or loans effected by the corporations. By "cost" is meant the actual amount of money expended in the construction of the railroad and its equipment, regardless of debts outstanding and regardless as well of the amount or value of the capital stock outstanding at the time of such purchase.

There are doubtless many difficult questions of detail to be met with in the application of these general rules. It would be impossible to state, much less to meet and consider, such questions until they arise; and I have not attempted in this opinion to do more than to set forth what in my opinion are the general rules of compensation to be paid in event of such purchase.

Question 3, in the order of February 13, inquires: "At what probable or approximate price, under existing laws and charters, could the Boston & Albany Railroad be bought by the Commonwealth on March 1, 1900?" Question 1, in the order of February 14, inquires, referring to the taking or purchase of the road by the Commonwealth, "How much would such taking or purchase cost the Commonwealth?"

These are not questions of law. I have set forth above the basis upon which the cost in either method is to be ascertained; further than this I do not feel authorized or required to go.

Question 1, in the order of February 13, above quoted, further inquires, relating to the taking by purchase or otherwise of the property of the Boston & Albany Railroad Company, "How and to what extent would those rights and said cost be changed, if at all, by the ratification of the lease as proposed in the bill now before the General Court?"

The right of taking by eminent domain is based upon the Constitution, and cannot be annulled or hampered as to any Legislature by the acts of a previous Legislature. The right, therefore, of taking the property for public uses under the Constitution is not affected by the ratification of the proposed lease.

I am further of the opinion that the ratification of the proposed lease does not deprive the Commonwealth of its rights to purchase reserved to it in the charters of the corporations and the special laws above set forth. The exercise of that right is no more inconsistent with the rights of the lessee than it would be with those of the lessor if no lease had been made. The contracting parties are presumed to have had in mind the existence of the rights reserved to the Commonwealth, and to have executed their lease subject thereto. If the Commonwealth assents to the lease, it does not expressly, or in my opinion by implication, waive or surrender any rights reserved to it under existing laws.

In case the Commonwealth should exercise its rights of purchase, I do not see how the question of cost would be affected by the existence of the lease, excepting in respect to the property proposed to be purchased by the lessee for the sum of \$5,500,000, the questions arising upon which will be considered hereafter. In case the property should be taken by the Commonwealth in the exercise of the right of eminent domain during the continuance of the lease, the lessee would undoubtedly have the right to recover the damages, if any, accruing to it by the destruction of its leasehold interest.

4 (order of February 13). "Could the Commonwealth, after the ratification of the proposed lease and the carrying out of the supplemental agreement, buy the Boston & Albany Railroad for as much less than before said ratification and carrying out as is the amount (\$5,500,000 in bonds) to be paid by the New York Central & Hudson River Railroad Company for the property excepted from the lease and described in schedule A annexed thereto?"

The sum of \$5,500,000 referred to in this question is the proceeds of property belonging to the lessor sold by it to the lessee. Upon the consummation of the lease and sale the property will

cease to be a part of the railroad property which would be included in the taking of such property by the Commonwealth in the exercise of its right of eminent domain, or in the purchase thereof under its statutory rights. The value of the property so sold should, in my opinion, be deducted from the damages in the case of taking, and from the price to be paid in the case of purchase. In the latter case, the price to be paid is the cost of making the railroad. Whatever sums have heretofore been expended for the property so sold should be credited upon this cost. This credit would not necessarily be the price for which the property is sold to the New York Central & Hudson River Railroad Company, but, as to the land at least, its actual cost when acquired by the railroad company. If it had been acquired at a less cost than the said sum of \$5,500,000, the railroad would be entitled to the benefit of the increase; correspondingly, if the cost of the land was greater, the loss would fall upon the railroad company.

5 (order of February 13). "Is it in accord with public policy, as declared in legislation of the Commonwealth and the decisions of its Supreme Judicial Court, that the property (and especially the parcel of land) included in schedule A, annexed to the proposed lease, and described in the first clause of the lease as 'not needed for the railroad purposes' of the New York Central & Hudson River Railroad Company, should be sold to said company, and in the manner prescribed in the supplemental agreement?"

The proposed transaction referred to in this question is the sale of certain property of the lessor, a domestic railroad corporation, to the lessee, a foreign railroad corporation.

Upon such investigation as I have been able to make, I have not discovered that any such transaction has heretofore taken place in this Commonwealth; and I am not aware of any case in the courts of the Commonwealth in which such a transaction has been discussed, nor of any legislation, enacted or proposed, in relation to such a transaction. There is, therefore, no declared policy of the Commonwealth upon the subject.

The foregoing appears to answer the question proposed, so far as the same can be answered. I may properly add, however, that

it is doubtful whether the question submitted is one of law, the duty of answering which is incumbent upon the Attorney-General. Questions of public policy are peculiarly within the province of the Legislature. The term "public policy" may be defined to mean whatever is declared by the Legislature, within its authority under the Constitution, to be wise or expedient. That body is not and cannot be, bound or even guided by declarations of a preceding Legislature. This being so, the question submitted is, in essence, as a matter of public policy, should the Legislature authorize the transaction proposed? Upon such a question it is unnecessary to observe that the Attorney-General would not be authorized to express an opinion.

6 (order of February 13). "Under the first clause of the proposed lease, and the supplemental agreement, could the Boston & Albany Railroad Company distribute annually among its stockholders the interest (\$192,500) received from the \$5,500,000 bonds?"

7 (order of February 13). "Under the first clause of the proposed lease, and the supplemental agreement, could the Boston & Albany Railroad Company sell the \$5,500,000 bonds and distribute the proceeds among its stockholders?"

The bonds referred to in the foregoing questions are the proceeds of certain property to be sold by the Boston & Albany Railroad Company to the New York Central Railroad Company, upon the execution of the proposed lease. It is declared in the first article of the lease that the property so sold is "not needed for the railroad purposes of the lessee." It is obvious that, if the lease be executed, the property will not be needed for the railroad purposes of the lessor, and will become assets in the hands of the Boston & Albany Railroad Company, to be disposed of as it sees fit, unless restrained by some provision of law.

The only statute bearing, even remotely, upon the subject, is St. 1894, c. 350, which is substantially a re-enactment of Pub. Sts., c. 112, § 61. The first section of the statute referred to provides as follows: "No . . . steam railroad . . . company established under the laws of this Commonwealth shall declare any stock or scrip dividend, or divide the proceeds of the sale of

stock or scrip among its stockholders; nor shall any such company create any additional new stock, or issue certificates thereof to any person, unless the par value of the shares so issued is first paid in cash to its treasurer."

In 1882 the Commonwealth, in accordance with the provisions of St. 1882, c. 121, assigned to the Boston & Albany Railroad Company about 24,000 shares of the capital stock of the corporation, receiving in exchange therefor five per cent. bonds of the corporation. The corporation held the stock until September 27, 1883, on which day it voted to distribute about 17,000 shares of the stock so purchased from the State among its stockholders. A bill in equity was brought by the Attorney-General to restrain this issue. He relied principally upon the provisions of the statutes above referred to. It was held by the court, however, that, although literally the division of the stock so purchased was a stock dividend, yet, in view of the fact that under the terms of the statute authorizing the sale the shares so purchased belonged to the corporation, with the right to hold and dispose of the same as its absolute property, the provisions of the Public Statutes, which, as I have already stated, were substantially re-enacted in the statute of 1894, were not effectual to restrain the company from dividing property, which it held free of all trusts, among its stockholders. *Com. v. B. & A. R.R. Co.*, 142 Mass. 146.

I am of the opinion that the doctrine of this case, as well as the general principles of law applicable to corporations and corporate property, are conclusive of the questions submitted, and that the bonds acquired by the Boston & Albany Railroad under the terms of the lease and agreement, when ratified by the Commonwealth, will become its absolute property, and that the interest of the bonds may be divided among its stockholders; and that it may also sell the bonds and divide the proceeds among the stockholders.

8 (order of February 13). "Under the proposed lease, and especially the third clause thereof, could the New York Central & Hudson River Railroad Company assign the lease, or underlet the main line of the Boston & Albany Railroad or the main line of any of the branches of the latter, by obtaining the consent in

writing of the latter and without obtaining the consent of the Commonwealth?"

9 (order of February 13). "Under the proposed lease, and especially the tenth clause thereof, could the New York Central & Hudson River Railroad Company and the Boston & Albany Railroad Company modify, change, amend, annul or cancel the lease by mutual agreement and without obtaining the consent of the Commonwealth?"

The third clause of the proposed lease is as follows: "The lessee shall not assign its lease nor underlet either the main line of the lessor's railroad or the main line of any of its branches without the consent in writing of the lessor."

The tenth clause is as follows: "Nothing herein contained shall prevent the lessor and lessee from modifying, changing, amending, annulling or cancelling this lease by mutual agreement."

I am of opinion that the consent of the Commonwealth to the proposed lease, though containing the terms above quoted, does not operate as a repeal of the laws of the Commonwealth in relation to the leasing of railroad corporations. The Commonwealth is not a party to the lease, and does not become so in the sense that it is estopped from executing its own laws, excepting, of course, that it suspends its general prohibitions so far as to consent that the Boston & Albany Railroad may be leased to the lessee named. The stipulations in the lease itself, relating to the rights of the parties as to assigning, underletting, annulling or altering the lease, are binding upon the parties thereto. But they are deemed to be entered into in view of the laws of the Commonwealth governing these subjects, none of which is waived in favor of the parties by the consent of the Commonwealth to the execution of the lease. The rights of the parties, therefore, upon this question, depend, so far as the Commonwealth is concerned, not upon the terms of the lease, but upon the laws of Massachusetts. It is scarcely necessary to say that the State of New York has no power to enact a law authorizing the leasing of a railroad in Massachusetts in violation of the laws of the Commonwealth.

It is well settled in this Commonwealth that railroads within its

jurisdiction may not be leased excepting by its consent. Railroad corporations cannot divest themselves of the obligations to the public which they assumed when they accepted their charters by turning over such obligations so imposed to be performed by others, whether by lease or otherwise. The only exception is the express statute provision (Pub. Sts., c. 112, § 220) authorizing a railroad connecting with another railroad to lease its road to the connecting corporation. With this exception, any contract, such as a lease, by which a railroad corporation undertakes to divest itself of the duties imposed upon it by its charter is *ultra vires*, and, consequently, void.

These considerations govern the questions submitted. The underletting or sub-leasing of a railroad by a lessee is, in effect, a transfer of the obligations of the lessee to another party. If a lease is authorized by the sovereign, the lessee succeeds to the duties of the original company, and has no more right to divest itself of those duties than had the original company itself. It follows that the lessee in the proposed lease has no authority to assign its lease or to underlet the lines of the Boston & Albany Railroad or any of the branches acquired by the lease.

For the same reasons, the lease cannot be modified, amended or changed by the contracting parties without the consent of the Commonwealth. Such changes, modifications or amendments would constitute a new lease, and the principles of law governing leases would be in force as to such new lease.

It is the inherent right of parties to a contract, in the absence of any statutory provisions to the contrary, and whether so formally expressed in the contract or not, to cancel by mutual agreement any contract into which they may have entered. There is nothing in the laws of the Commonwealth which forbids the annulling by the parties of a railroad lease. I am of opinion, therefore, that the lease proposed may at any time be annulled by the joint action of the parties thereto.

Although it is not within the scope of the question submitted, I may further say that the question of what remedy the Commonwealth may have, should the lessee assign its lease, especially to another foreign corporation, is one of more difficulty. As I have

before said, such an assignment of the lease would be *ultra vires* and void. I have referred, in my answer to a succeeding question, to the statutes conferring jurisdiction upon our courts to entertain a suit by the Commonwealth against the lessee for violation of its duties to the Commonwealth. The assignee of the lessee, if a foreign corporation, would be subject to the provisions of the same statutes. The federal courts in the jurisdictions of the foreign corporations would also be open to the Commonwealth. Whether these provisions are sufficient, and whether it is wise to make further provisions guarding the rights of the Commonwealth in the case of such an attempted assignment or sub-letting, is a matter properly for the consideration of the Legislature rather than of the Attorney-General.

2 (order of February 14). "If the property and franchises of the Boston & Albany Railroad Company are leased to the New York Central & Hudson River Railroad Company, with the assent of the Commonwealth, as proposed in said bill, and the law in regard to returns to the Board of Railroad Commissioners remains as it is, will either of said corporations thereafter be compelled to make such returns showing the receipts, expenses and profits from the operation of the Boston & Albany Railroad?"

There are two statutes relating to returns by railroad corporations, viz., Pub. Sts., c. 112, §§ 81-83, and St. 1893, c. 131. It does not appear that the latter statute is intended to be a repeal of the provisions in the Public Statutes.

Pub. Sts., c. 112, § 81, provides, among other things, that every railroad corporation shall annually, on or before the first Wednesday of November, transmit to the Board of Railroad Commissioners a report of its doings for the year ending on the thirtieth day of September preceding, to be called the annual return. Such report shall include a detailed statement of all particulars respecting the railroad, its business, receipts and expenditures during the year, in such form as shall be, from time to time, prescribed by the Board, under § 26 of the same chapter. When a domestic corporation leases the railroad of another domestic corporation, the returns prescribed by § 83 shall be made by the lessee, and during the continuance of the lease the

lessor is not required to make such returns. The section further provides, however, that, "if a railroad in this Commonwealth is leased to a corporation or party in another State, the lessors in this Commonwealth shall make the annual return."

The clause quoted applies to the parties to the proposed lease. I do not think, as has been suggested, that, in case the lease is effected, the Boston & Albany Railroad Company will discharge its duty by making returns merely of the rent received under the lease and the payments of dividends, bond interest and organization expenses. Such returns are sufficient in the case of corporations whose roads are leased to other domestic corporations, because in such cases all the detailed returns of the business of the road are to be made by the lessee. This lease being to a foreign corporation the statute imposes upon the lessor the whole burden of the annual returns, and I am of opinion that all the obligations now incumbent upon the Boston & Albany Railroad under the Public Statutes will continue in full force in the event of the execution of the proposed lease. Whether the returns provided for by the sections in question are sufficient to show the "receipts, expenses and profits from the operation of the Boston & Albany Railroad," I am not informed. If they are so now, they will none the less be so after ratification of the proposed lease, for they must then still be in the same form and must contain the same details.

How the Boston & Albany Railroad Company may supply itself with information to make the returns required is not pertinent to the present inquiry. It appears, however, to have attempted to guard itself by art. 6 of the lease, which provides that the lessee shall "furnish the lessor with such statements and accounts in its possession and control as are requisite to enable the lessor to make all returns by law required of it; and shall permit and afford suitable facilities for the officers of the lessor, by themselves or by agents appointed by them, to examine the demised property once each year, so far as may be necessary to ascertain the condition thereof." The lease further provides, in art. 9, that the contract may be annulled by the lessor upon neglect or failure of the lessee to perform either of the covenants of the lease. This would seem to give to the Boston & Albany Railroad Company full power to

obtain all facts necessary to make the returns required of railroad companies by the commissioners.

St. 1893, c. 131, provides as follows: "Every railroad corporation operating a railroad within this Commonwealth shall, within fifty days after the expiration of each quarter of the calendar year, transmit to the board of railroad commissioners a quarterly statement of its business and financial condition, made up in such form and with such detail as said board may require; and such statement shall at reasonable times be open to public inspection. A railroad corporation neglecting to make and transmit any such quarterly statement within the time above prescribed shall forfeit fifty dollars for each day's neglect."

If the lease goes into effect, the New York Central & Hudson River Railroad Company will become the railroad corporation operating the railroad within the meaning of this act. The duty of complying with the provisions of this statute, consequently, will fall upon the lessee and not upon the lessor.

A further question arises whether this statute can be enforced against the lessee, a foreign corporation. The penalty for neglect to comply with the provisions of the statute is a forfeiture of fifty dollars per day. By Pub. Sts., c. 217, § 2, a forfeiture accruing to the Commonwealth may be recovered in an action of tort. Such action, however, cannot be maintained in the courts of the Commonwealth unless jurisdiction be obtained against the foreign corporation, by attachment of property or by the consent of the corporation.

St. 1884, c. 330, § 1, provides that every foreign corporation having a usual place of business in this Commonwealth shall appoint, in writing, the Commissioner of Corporations to be its attorney for the service of process, and shall agree that any process served on such attorney shall be of the same legal force and validity as if served upon the company. Section 3 of the same chapter provides that every officer of the corporation which fails to comply with the requirements of this act, and every agent of such corporation who transacts business as such in this Commonwealth, shall, for such failure, be liable to a fine not exceeding five hundred dollars. Under this statute it will be the duty of

the lessee corporation to appoint an attorney and enter into such agreements as will give the courts of this State jurisdiction to entertain suits against it, including, of course, actions of tort for failure to make returns. If it fails to appoint such attorney, every agent of the corporation within this State is liable to the fine prescribed.

Whether these provisions of law are sufficient to enable the Commonwealth and its officers to secure the returns required, and whether additional restrictions should be imposed by the Legislature looking to an increase of the power of the Commonwealth to enforce the provisions of its laws as against the lessee, are questions peculiarly for the consideration of the Legislature, rather than of the Attorney-General.

It should be further said that by the sixth article of the proposed lease the lessee expressly agrees that it will "make all returns by law required of it." This provision, however, enures to the benefit of and may be enforced by the lessor, and may not be availed of by the Commonwealth.

3 (order of February 14). "Prepare and furnish to the House of Representatives a collection of all the special legislation affecting said railroad, or the corporations operating the same, from the time of and including the charters thereof."

While entertaining the highest respect for the authority of the Honorable House of Representatives, I am of opinion that the foregoing order is not a question of law within the meaning of Pub. Sts., c. 17, § 7, making it the duty of the Attorney-General to "give his opinion upon questions of law submitted to him by either branch of the General Court, or by the Governor and Council," and that it is not within the jurisdiction of the House of Representatives to require of the Attorney-General the performance of the duty imposed by this order.

I beg to inform the Honorable House of Representatives, however, that for my own use in answering the questions submitted I have caused to be prepared elaborate and detailed schedules, not only of the "special legislation affecting the Boston & Albany Railroad, and the corporations operating the same from the time of and including the charters thereof," but of many of the general

railroad laws affecting the questions submitted. These schedules are at the service of the House of Representatives, or of such committees of the Legislature as may desire to use them, and for that purpose are herewith transmitted.

MEDFIELD INSANE ASYLUM — APPROPRIATION.

The appropriation of \$25,000, under St. 1897, c. 205, for the use of the trustees of the Medfield Insane Asylum in completing the asylum, is not governed by the statutes relating to annual appropriations, providing that if not expended within two years such appropriation shall lapse.

A reservation of \$2,000, made by the trustees and not by the Legislature, becomes, when the purposes for which it was reserved are accomplished, available for use in accordance with the original purposes of the appropriation.

To the Trustees
of the Medfield
Insane
Asylum.
1900
April 4.

I have your letter of the 29th, stating that after settling all possible claims for land damages, \$2,000 of the appropriation granted your commission under St. 1897, c. 205, which had been reserved to pay such damages, is now available; and requiring my opinion upon the question whether it can be used for extending the water system of the asylum and supplying the stock barn.

The statute in question appropriated the sum of \$25,000 for the use of the trustees in completing the asylum. There is nothing in the act which requires you to set aside any balance for land damages, although, of course, it was your duty to see that they were paid from the appropriation. The reservation of \$2,000 therefore, being voluntary and not made by the Legislature, becomes, when the purposes for which you have reserved it are accomplished, available for use in accordance with the original purposes of the appropriation, and may be so expended.

This appropriation is not governed by the statutes relating to annual appropriations, providing that they shall be expended within two years, and if not so expended shall lapse.

BOSTON, CAPE COD & NEW YORK CANAL COMPANY — ISSUE
OF STOCK NOT REPRESENTING COST OF CONSTRUCTION —
WATERED STOCK.

A bill to amend the charter of the Boston, Cape Cod & New York Canal Company, instead of providing for the authorization of stock and bonds from time to time, as the needs of construction require, and for the expenditure of the proceeds only in such construction, requires the joint board provided for in the charter to ascertain in advance the entire cost of the canal, and to authorize the issuance of the whole amount of stock and bonds needed to cover the cost so ascertained. If the actual cost of construction should be less than such estimate by the joint board, the balance of stock not required for purposes of construction would become the property of the corporation, and, in so far as it did not stand for nor represent capital actually invested, would be "watered stock."

I have the honor to acknowledge the receipt of a copy of the order adopted by the Honorable Senate April 5, requiring the opinion of the Attorney-General upon the following question, to wit: "Would the enactment of House Bill No. 976, being an act relative to the Boston, Cape Cod & New York Canal Company, as amended by the House and by the Senate on April 4, 1900, afford to the Boston, Cape Cod & New York Canal Company under any circumstances the opportunity in the issue of their securities to practice what is commonly known as stock watering?"

To the Senate.
1900
April 6.

Inasmuch as the original charter of the company (St. 1899, c. 448) provides that the stock and bonds authorized therein shall be issued under the provisions of St. 1894, c. 462 (being what is commonly called the anti-stock-watering act relating to steam and street railways), I assume that the purpose of the question submitted is practically to require the opinion of the Attorney-General on the question whether the amendment excepting the company from certain of the provisions of that act so far modifies the act as to make it possible for the company to issue stock not representing capital actually invested.

I understand stock watering to be the issuance of stock not based upon capital actually invested. The anti-stock-watering act, to which I refer (St. 1894, c. 462), is intended to prevent the possibility of such over-issuance. It provides, in substance, that

railroad and street railway companies shall "hereafter issue only such amounts of stock and bonds as may from time to time, upon investigation by the board of railroad commissioners, be deemed and be voted by them to be reasonably requisite for the purposes for which such issue of stock or bonds has been authorized." The act further provides that the "vote of the board approving such issue shall specify the respective amounts of stock and bonds authorized to be issued for the respective purposes to which the proceeds thereof are to be applied." And to make it certain that such stock and bonds shall represent only expenditures actually incurred, the act further provides that "no company included in the terms of this act shall apply the proceeds of such stock or bonds to any purpose not specified in such certificate."

The present bill amends the original charter by modifying certain of the provisions of the anti-stock-watering act in their application to this company. Instead of providing for the authorization of stock and bonds from time to time, and only as needs of construction require, and providing that the proceeds shall be expended only in such construction, it requires the joint board to ascertain in advance the entire cost of the canal and its equipment, and to authorize, in the first instance, the issuance of the whole amount of stock and bonds which will be needed to cover the cost so ascertained. It contains no provision for cancellation of any stock which shall prove not to be required, in case it shall turn out that the estimate of the joint board was in excess of the actual cost.

If the joint board is able to ascertain definitely the cost of construction and equipment of the canal, there appears to be no more liability to stock watering in the present bill, as amended, than in the original charter. If, however, the actual cost of construction shall prove to be less than the estimate so fixed in advance by the joint board, the balance of stock in the hands of the State Treasurer not required for the purposes of construction will become the property of the corporation, and, in so far as it does not stand for nor represent the cost of construction, will be, as I understand the term, watered stock.

In this aspect of the case, the question, therefore, is one of fact rather than of law. In case the board shall be able to estimate correctly the cost of the canal, and shall authorize the issuance of only so much stock and so many bonds as are equivalent to such cost, there will apparently be no opportunity for stock watering. But, if, on the other hand, the board overestimates the cost, there being no provision for cancellation of stock and bonds which prove to be not actually needed for the purpose of construction, the issuance of the whole stock having been authorized in advance, the result will be that the surplus stock and bonds to which the company may so become entitled will be stock not representing capital actually invested, and will come within the definition of what I understand to be watered stock.

INSURANCE — REINSURANCE — FORM OF CONTRACT.

A contract of reinsurance is not a contract of insurance "on property" within the meaning of St. 1894, c. 522, § 60, and such contracts entered into by insurance companies need not be in the standard form required by that section.

Your letter of April 3 requires the opinion of the Attorney-General upon the question whether contracts of reinsurance entered into by insurance companies must be in the standard form provided by St. 1894, c. 522, § 60.

To the Insurance Commissioner.
1900
April 6.

The section in question provides that insurance companies making contracts of insurance "on property" must issue them in the standard form. A contract of reinsurance, however, is not a contract of insurance on property, within the meaning of that section. The original policy is such an insurance upon property, but reinsurance is merely a contract between two companies that the reinsuring company will assume the whole or a portion of the risk taken by the original company. There is no statute, therefore, requiring the contract of reinsurance to be in the standard form, or in any other particular form.

The law requiring contracts of insurance to be made in the standard form is for the benefit of insured who might otherwise

not easily understand all the provisions contained in the policy which they receive. Contracts of reinsurance, however, are entered into between insurance companies who are able to protect themselves, and may therefore make such contracts as they see fit.

PAUPER — MARRIED WOMAN — DOMICILE — SETTLEMENT.

In Pub. Sts., c. 83, § 1, cl. 7, which provides that only such married women as have not a settlement "derived by marriage" may gain a settlement by residence, the words "derived by marriage" signify an existing marriage.

Therefore, a married woman settled under a previous marriage, which has been terminated by the death of the husband, is not prevented from acquiring a new settlement by residence. Where a wife, deserted by her husband, remains for a period of more than twenty years where their joint domicile had been, she will not be debarred from gaining a settlement by the fact that he has had no settled place of residence since the time of such desertion.

To the Super-
intendent of
State Adult
Poor.
1900
April 6.

Your letter of January 11 requires the opinion of the Attorney-General as to the settlement of a female, upon the facts stated in a history annexed to the letter, which is substantially as follows:—

The female in question was born in Northampton, in 1847. She was married in 1868 to a man who had a military settlement in Shutesbury. This husband died in 1869. In 1871 she was married a second time, and removed with her husband in 1873 to Worcester, where she has since resided. She had aid in 1886 for her child by her first husband. This aid was furnished by Worcester, and for it Worcester was reimbursed by Shutesbury.

Her second husband abandoned his family in Worcester in 1875. "He has not lived with his wife since, and has done nothing for her support. He has resided most of the time since leaving her in New York and Washington, D. C. He has made occasional visits to Massachusetts, but never to remain over two or three weeks. His wife saw him in Amherst, on the street, in 1896. He has gained no settlement in his own right."

The woman in question acquired a settlement in Shutesbury through the military settlement of her first husband in that place.

After his death, in 1869, she came within the provisions of Pub. Sts., c. 83, § 1, cls. 6 and 7, which are as follows: "Sixth, Any woman of the age of twenty-one years, who resides in any place within this state for five years together, shall thereby gain a settlement in such place." "Seventh, The provisions of the preceding clause shall apply to married women who have not a settlement derived by marriage under the provisions of the first clause, and to widows; and a settlement thereunder shall be deemed to have been gained by an unsettled woman upon the completion of the term of residence therein mentioned, although the whole or a part of such term has already elapsed." If she had remained a widow, she would have acquired a settlement in Worcester by her residence in that city for five years after 1873. Her second marriage being to a man who had no settlement, and from whom, consequently, she could derive no settlement, her right to acquire a settlement by residence was not defeated by such marriage. It is true the language of clause 7 makes the provisions of clause 6 apply to "married women who have not a settlement derived by marriage." These words, however, obviously are to be taken to signify a settlement derived by an existing marriage, and do not prevent married women settled under a previous marriage, which has been terminated by the death of the husband, from acquiring a new settlement by residence.

Nor was she debarred from gaining a new settlement in Worcester by reason of the fact that her husband has had no settled place of residence since 1875. He was domiciled in Worcester until that time, and after his desertion of her, she remaining where their joint domicile had been, I am of opinion that her domicile cannot be taken to have shifted with his throughout his wanderings. The former rule, that a wife's domicile must, in all cases, be identical with her husband's, is now subject to many exceptions. 2 Op. Atty.-Gen., 15. See also *Burtis v. Burtis*, 161 Mass. 508. Notwithstanding his changes of residence, I am of opinion that she resided in Worcester within the meaning of that word as used in the statutes relating to settlement.

It is scarcely necessary to say that the aid furnished to the child of her first marriage in 1886 does not affect the question. The child's settlement followed that of his father, which was in Shutesbury.

RESIDENCE — ENLISTMENT.

A person is, in general, a resident of Massachusetts who lives in the Commonwealth with the intention of having his home there. A person so residing in Massachusetts, who was mustered into the regular army, whether naturalized or not, comes within the provisions of St. 1898, c. 561, § 1.

To the
Treasurer
and Receiver-
General.
1900
April 12.

Replying to your letter of April 4, I have to say that, in my opinion, the word "residents," as used in St. 1898, c. 561, § 1, providing that there shall be paid "to residents of Massachusetts mustered into the regular army or navy or into the volunteer brigade of engineers of the United States during the present war, the sum of seven dollars per month," is not limited to persons who are citizens of Massachusetts. The act is remedial, and is to be liberally construed; and I am clearly of the opinion that the inducements to enlistment held out by the act were intended to be for the benefit of all persons living in the Commonwealth, whether naturalized or not.

What constitutes residence is largely a question of fact. I can only say, in general, that a person is a resident of Massachusetts who lives in the Commonwealth with the intention of having his home here. A person who was living in Massachusetts, making it his home, and while so residing was mustered into the regular army, comes within the provisions of the act.

Although this general definition of residence may serve your purpose, it may, perhaps, be better, where the conclusions to be drawn from the facts seem to you to be doubtful, to refer the case to this office for more specific consideration.

**CITY OF HOLYOKE — HOLYOKE WATER POWER COMPANY —
CONTRACT — ANNUAL PAYMENT BY CITY FIXED BY VALUA-
TION OF PROPERTY — ASSESSORS.**

The approval by the Legislature of a contract between the city of Holyoke and the Holyoke Water Power Company, providing that the company shall have certain rights "subject to such provisions of the general laws of Massachusetts now in force" as relate to such rights, will not serve to exempt the company from the operation of such laws thereafter enacted as affect any rights or duties of the company as they exist under the laws now in force.

A clause in such contract which provides that the price fixed in a lease for the use of lighting apparatus shall be increased or decreased as the values put upon the property by the assessors increase or diminish, is not in conflict with the general laws of the Commonwealth relating to taxation, since it does not bind the assessors, who are not agents of the city, but a board of public officials acting under the authority of the statutes of the Commonwealth.

I have the honor to acknowledge the receipt of a copy of a joint order of the Legislature, adopted April 10, requiring the opinion of the Attorney-General upon certain questions touching the construction of a contract which has been executed between the city of Holyoke and the Holyoke Water Power Company, in which contract it is stipulated that it shall be in force only when approved by the Legislature.

To the Senate
and House of
Representa-
tives.
1900
April 13.

The contract provides that "the party of the second part shall have the right to maintain and use an overhead system of lighting, and the right to lay down and maintain its pipes in said highways for the distribution of gas, subject to such provisions of the general laws of Massachusetts now in force (and of the present revised city charter of said city of Holyoke) as relate to the erection and maintenance of said overhead system and the laying and maintaining of said pipes." The joint order requires the opinion of the Attorney-General upon the question whether "the effect of this clause would not be to exempt the company from the operation of all general laws relating to gas pipes and overhead wires which may be enacted by future legislation during the period covered by the contract."

I presume it may be contended that the Legislature, by approving the contract, so far becomes a party thereto that the use of the expression in the contract "general laws of Massachusetts now in

force" binds the Commonwealth as a contracting party not to impair the obligation of its contract so created by making any changes in existing general laws which shall affect any rights or duties of the company as they exist under the laws now in force.

I am of opinion, however, that this contention is not well founded. The approval of the contract in question does not amount to a contract between the Commonwealth and the Holyoke Water Power Company that it will not amend or repeal existing laws relating to gas pipes and overhead wires. The contract itself is between the city and the company, and the effect of the clause in question is to estop the city from objecting to the maintenance by the company of gas pipes and overhead systems of lighting such as are authorized by existing laws. As a contract, it binds only the parties thereto. The Commonwealth, by an act approving the contract, authorizes the parties so to bind themselves, but does not bind or estop itself.

The Legislature has, under the Constitution, the right to "make, ordain and establish, all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions and instructions, either with penalties or without; so as the same be not repugnant or contrary to this constitution, as they shall judge to be for the good and welfare of this Commonwealth." Const. of Massachusetts, c. 1, § 1, art. 4. The power granted by this clause is frequently referred to as the police power of the Legislature. The clause itself has been considered in many cases before the Supreme Judicial Court, and has almost uniformly been construed liberally as a grant of power to the Legislature. I am of opinion that the approval of the existing contract cannot be construed as a restraint upon the power of the Legislature granted to it by the article of the Constitution quoted, and that it may, at any time, notwithstanding this contract, enact such general laws relating to gas pipes and overhead wires as it deems to be for the welfare of the Commonwealth and its citizens.

The second question contained in the order is whether "the provisions in the said contract which relate to taxation and tax valuation are not in conflict with the laws of the Commonwealth relating to these matters."

The clause referred to in this question is as follows: "The foregoing prices are based upon the valuations for taxation on the tax list of the said city of Holyoke, for the year 1898, of the electric light and gas plants belonging to said Holyoke Water Power Company within the city of Holyoke, including the valuation of the pipes and structures within the limits of the highways. If any of said valuations are hereafter increased or decreased, with the result that the taxes to be paid by said Holyoke Water Power Company upon said properties are increased or decreased, then the gross amount to be paid annually thereafter by the city for said lighting shall be increased or decreased by the amount of said increase or decrease of said taxes: *provided, however*, that this clause shall not apply to any general increase in valuation for the purpose of taxation of property throughout the city in which increase the said Holyoke Water Power Company shall share pro rata, nor to any extensions and improvements in said gas and electric light plants since May 1, A.D. 1898, nor to any new building on said plants which shall be erected in lieu of or for the purpose of taking the place of present buildings connected with said plants, provided such new buildings exceed in value the present buildings, in which case this clause shall not apply to such excess of value."

This clause is not in conflict with the general laws of the Commonwealth relating to taxation. It does not modify nor affect them. It merely provides that the prices fixed in the lease for the use of lighting apparatus shall be increased or decreased as the values put upon the property by the assessors of Holyoke are increased or diminished. It does not and cannot bind the assessors in any way. They are a board of public officers, acting under the authority of the statutes of the Commonwealth. They are independent of and are not the agents of the city of Holyoke. The municipality, which is the only party to the contract in question, has nothing to do with the matter of taxation. The contract does not attempt to fix the valuation, but only the price as dependent on such valuation.

I therefore answer both questions submitted by the order in the negative.

CHARITABLE CORPORATION — BOSTON LYING-IN HOSPITAL —
PATIENT HAVING NO SETTLEMENT WITHIN THE COMMON-
WEALTH.

The Boston Lying-in Hospital is not a city hospital within the meaning of St. 1898, c. 391.

The State Board of Charity may approve a bill for a "reasonable expense" for care of a patient having no settlement within the Commonwealth.

To the State
Board of
Charity.
1900
April 18.

Your letter of April 9 requires the opinion of the Attorney-General upon the question whether the State Board of Charity is authorized to approve bills rendered by the city of Boston for the confinement of women having no settlement in this State, who are sent by the city of Boston to the Boston Lying-in Hospital, to be treated there during their confinement. Your letter further states that the precise inquiry is whether the Board is limited under the statutes to an allowance of \$5 per week in such cases, the hospital in question being a charitable corporation, receiving no support from the city of Boston except as said city pays for individual cases sent to it. The charges of the hospital are in excess of \$5 per week.

St. 1898, c. 391, which governs the case, provides that: "The reasonable expense incurred by a city or town under the provisions of the preceding section . . . shall be reimbursed by the Commonwealth . . . and not more than five dollars a week shall be allowed for the support of a person in a city or town hospital." The Boston Lying-in Hospital is not a city hospital, within the meaning of that expression as used in the statute. The hospital was incorporated by St. 1832, c. 21. The charter gave to it the powers usually granted to such corporations, but made it in no way subject to or dependent upon the city of Boston.

I am of opinion, therefore, that the Board of Charity may approve a bill for a "reasonable expense," as provided in the statute, and that the Commonwealth's liability is not limited to \$5 per week.

REGISTERED PHARMACIST — REVOCATION OF CERTIFICATE —
NEW EXAMINATION — MISTAKE OF FACT.

The Board of Registration in Pharmacy may, in its discretion, grant a new examination to a person whose certificate of registration as a pharmacist has been duly revoked by the Board.

Where the Board has regularly revoked a license, it has no authority to reconsider such decree and to grant a new license without a new examination.

The Board may, however, reconsider a revocation decreed through mistake of fact.

Your letter of April 4 requires the opinion of the Attorney-General upon two questions, to wit: —

1. Can the Board of Registration in Pharmacy lawfully grant an examination, as provided in § 5, c. 397, Acts of 1896, to a person whose certificate of registration as a pharmacist has been revoked altogether, as provided in § 9 of said act?

2. When the certificate of a registered pharmacist has been revoked altogether, as provided in § 9, c. 397, Acts of 1896, can the Board reconsider, revoke, change or modify its decision or sentence, the same having gone into effect?

St. 1896, c. 397, governs the action of the Board in relation to the examination of persons desiring to do business as pharmacists. The material sections are as follows: —

SECTION 5 [as amended by St. 1899, c. 422]. Any person desiring to do business as a pharmacist shall upon payment of a fee of five dollars be entitled to examination, and if found qualified shall be registered as a pharmacist, and shall receive a certificate signed by the president and secretary of said board. Any person may be re-examined after the expiration of three months, at any regular meeting of the board, upon the payment of a fee of three dollars. All fees received by the board under this act shall be paid by the secretary of the board into the treasury of the Commonwealth.

SECTION 9. If the full board sitting at such hearing shall find that the person complained against is guilty of the acts charged against him, said board may suspend his registration as a pharmacist and his certificate thereof, for such term as the board in their judgment, after due consideration of the facts, may deem for the best interest of the public, or may revoke it altogether, but the license or certificate of registration of a registered pharmacist shall not be suspended or revoked for a cause punishable by law until after conviction by a court of competent jurisdiction.

To the Board
of Registration
in Pharmacy.
1896
April 21.

In a communication to your Board, dated October 3, 1899 (2 Op. Atty.-Gen., 97), I stated it as my opinion that, notwithstanding the absence of any express provision to the contrary, your Board could not be compelled to examine a person as an applicant for a certificate as pharmacist after you had duly revoked his license. I see no reason, however, why you may not, in the exercise of your discretion, grant a new examination to such person. The fifth section above quoted provides, among other things, that "Any person may be re-examined, after the expiration of three months, at any regular meeting of the board, upon the payment of a fee of three dollars." This is not, in my opinion, to be construed as making it compulsory upon you to grant a re-examination, but to authorize you to do so in your discretion.

Inasmuch as you have no right to grant a license excepting after examination, I am of opinion that after a license has been regularly revoked you have no authority to revoke your decree and grant a new license without a new application and examination. The certificate of the Board is a license to the holder thereof to do a business which the Legislature has seen fit to regulate under its authority to make laws for the good and welfare of the citizens of the Commonwealth. The Legislature has vested in the Board the authority of executing those laws. No man has the right to do the business of a pharmacist until he has satisfied the Board that he is qualified. A judgment of the Board revoking his license is a judgment that the good and welfare of the community would be endangered by his continuing to do business as a pharmacist. If such judgment has been entered for good cause, as prescribed by the Legislature, and without any mistake of fact, I am of opinion that it is final, and that the Board has no authority to revoke it.

It should be said, however, that it is the inherent right of every judicial body to correct mistakes of fact. If, therefore, a revocation has been decreed through a mistake of such a character, and without such cause as the statute recognizes as sufficient, your Board may undoubtedly reconsider the revocation and correct its error.

INSURANCE — SURRENDER OF POLICY — REBATE.

Where an insurant holding an assessment policy has contributed \$10 per \$1,000 of insurance to a "safety fund," in which both the insurant and the insuring company have interests, a transaction by which the policy holder receives a new "old line" policy as of the date of his assessment policy in consideration of the surrender of the latter, and an allowance of \$10 per \$1,000 of new insurance upon his first premium in consideration of the surrender of his interest in the safety fund, is not a "rebate" within the meaning of St. 1894, c. 522, § 68

The facts upon which you require my opinion, as stated in your letter of February 24, are substantially as follows: —

The Hartford Life Insurance Company was organized in 1867 as a regular stock life insurance corporation, with a paid-up capital of \$250,000. Under a special charter, granted by the State of Connecticut in 1880, it began operating as an assessment insurance corporation, continuing its stock business, however, as a separate and distinct department. In August, 1885, it was admitted to transact the business of assessment insurance in Massachusetts. December 31, 1898, it discontinued the assessment business and applied for admission to do a legal reserve business under St. 1894, c. 522, and its certificate of authority was issued in September, 1899.

While engaged in the business of insurance on the assessment plan, it devised and used what it called a "safety fund system." To this fund each person insured in that class contributed \$10 on each \$1,000 of insurance denoted by his policy. The provisions in relation to this safety fund are somewhat complicated. It is sufficient, however, for the purpose of your inquiry, to state that it is held in trust for the protection and security of insurers in the class contributing to the fund, and that, when the purposes set forth in the agreement with the trust company have been fully accomplished, the fund is to become the absolute property of the company. The agreement further provided that when the fund reached the sum of \$300,000, thereafter there shall be a pro rata division of interest semi-annually among the policy holders of this class who had contributed their stipulated portion of the fund, five years prior to the date of such division; and that, whenever the

To the Insurance Com-
missioner.
1900
April 27.

fund reached the sum of \$1,000,000, all payments to such fund thereafter should be divided like the interest. It was also provided that, as long as there should be a policy of this class outstanding, the trust fund, excepting as aforesaid, should remain intact.

The company desires to wind up its assessment business and to have all those who hold policies of assessment insurance exchange them for regular insurance policies. To this end the company proposes that, if an insured will surrender his assessment policy, it will issue to him an old line policy with the premium based on the age of original entry, take a lien thereon, or a premium note, for the amount of the reserve which would have accumulated had the policy been written originally as an old line policy, and pay him \$10 for each \$1,000 old line insurance so taken, deducting the same from the first premium on this new policy. The question stated by your letter is, whether that transaction constitutes a rebate within the meaning of that word as used in St. 1894, c. 522, § 68.

The section in question is as follows: "No life insurance company doing business in Massachusetts shall make or permit any distinction or discrimination in favor of individuals between insureds of the same class and equal expectation of life in the amount or payment of premiums or rates charged for policies of life or endowment insurance, or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of the contracts it makes; nor shall any such company or any agent thereof make any contract of insurance, or agreement as to such contract, other than as plainly expressed in the policy issued thereon; nor shall any such company or agent pay or allow, or offer to pay or allow as inducement to insurance, any rebate of premium payable on the policy, or any special favor or advantage in the dividends or other benefit to accrue thereon, or any valuable consideration or inducement whatever not specified in the policy contract of insurance."

It is contended that, inasmuch as the safety fund is the property of the corporation, and that, as is claimed, the policy holder has no interest in the fund, the payment of \$10 to the policy

holder at the time of paying his first premium, by deducting it from his first premium, amounts to a rebate within the meaning of that word as used in the statute. If it were true that the policy holder had no interest in the fund, the proposed transaction might amount to a rebate; but it clearly appears, upon an examination of the trust agreement, that he has an interest in the safety fund, which he loses when he surrenders his assessment policy. As stated above, he is entitled to a semi-annual interest payment from the fund, varying in amount according to the size of the fund, so long as his policy remains outstanding. How long the fund will be so held cannot now be determined. These interest payments he loses by surrendering his policy; while, on the other hand, the insurance company is clearly the gainer by the surrender of his policy, for the reason that all obligations attached to the safety fund are discharged when all such policies are surrendered, so that the fund will be so far the absolute property of the corporation that it may be divided among the stockholders or invested for their benefit. Even if the policy holder should not take out new insurance, it would be an advantageous contract for the company to offer to pay him the same sum proposed, as an inducement to him to surrender his policy.

It follows, therefore, that the proposition of the company is not made, primarily at least, as an inducement to insure, but to secure his release of his interest in the safety fund. He has acquired, under his old policy, a valuable interest in that fund, which, by his acceptance of the offer of the company, he gives up; while, on the other hand, the company, by the cancellation of his old policy, is relieved, so far as his policy is concerned, from the conditions upon which the fund is held. One of the considerations, therefore, for the payment of the \$10 is the surrender of the old policy, and, by consequence, the interest of the policy holder in the safety fund. The mere fact that, for convenience, the amount is deducted from his first premium in the new policy, does not change the essential character of the transaction.

It is true that, upon a voluntary surrender of his old policy by the insured, the company pays nothing for a release of his interest. There is no reason why it should, the surrender being voluntary

and without consideration. It is also true that the offer is limited to such old policy holders as exchange them for new policies. Notwithstanding these facts, it remains true that the release by the insured of his interest in the safety fund is, in part at least, a consideration for the payment of the \$10.

The whole transaction is a barter between the company and one of its policy holders, under the terms of which the insured remains a policy holder, gives up certain rights which he has, and in the place of them acquires new rights; while, on the other hand, the company pays the sum of \$10, and acquires certain releases of value to it from him. Such a transaction, in which there are considerations of various natures on each side, although one of them involves the taking out of a new policy in exchange for an old policy, is not, in my judgment, within the terms of the statute forbidding the payment of a rebate as an inducement to persons to take out insurance.

It ought to be added, however, as a necessary consequence of the foregoing considerations, that, if the deduction of \$10 is made from the first payment of one who formerly held an assessment policy, but whose policy has lapsed so that he no longer has any interest in the safety fund, such a deduction would be within the terms of the statute prohibiting rebates, unless, under the terms of his former policy, he has the right to have it revived.

RESIDENCE — EVIDENCE OF INTENTION — ENLISTMENT.

A person actually living in a city within the Commonwealth, who has filed his primary declaration of intention to become a citizen of the United States, describing himself as a resident of such city, and who enlists therefrom, is *prima facie* a resident of this Commonwealth, and is entitled to the benefits of St. 1898, c. 561.

The length of such residence is not material under the statute, except so far as it is confirmatory evidence of the intention of the party.

To the
Treasurer
and Receiver-
General.
1900
May 3.

Your letter of May 3 requires my opinion upon the question whether John Kennelly, upon the facts submitted with your letter, was a resident of Massachusetts at the time of his enlistment, within the meaning of that word as used in St. 1898, c. 561, so as to entitle him to the benefits of the provisions of that chapter.

It appears by the facts submitted that he came to this country from some foreign port, arriving in New York on the twenty-second day of June, 1898, which, as it happens, was the day on which the act in question was signed. He subsequently came to Springfield, where, on the nineteenth day of July of the same year, he filed his primary declaration of intention to become a citizen of the United States, describing himself as a resident of Springfield. He enlisted on the twenty-fifth day of July.

Prima facie he was a resident of Springfield at the time of his enlistment. He was there, and described himself as of that place. If he came there only for the purpose of enlistment, and not to become a resident of that city, he would not be within the act; but unless you are able to show otherwise, his removal to Springfield, declaration of intention and enlistment in that city are sufficient, in my opinion, to constitute him a resident and to entitle him to the benefits of the act in question. The length of time of residence is not material under the statute, excepting so far as it is confirmatory evidence of the intention of the party.

NEW ENGLAND COTTON YARN COMPANY — PRIVATE CORPORATION — STOCK WATERING — CAPITAL STOCK — COMMISSIONER OF CORPORATIONS.

The enactment of the bill to incorporate the New England Cotton Yarn Company, a private corporation, would afford no greater opportunity for the practice of "stock watering" than is given to such corporations in the general laws of this Commonwealth.

Corporations formed for the carrying on of private business, except for the requirement that they begin such business upon a fully paid capital are left free under the general laws from any supervision over the investment of their capital stock.

Stock watering is the issuance of capital stock that does not represent full value paid in, either in cash or in property. Since the Commissioner of Corporations has the final decision upon the value of property taken in exchange for shares (Pub. Sta., c. 106, § 48), the issuance of watered stock depends upon the ability of the commissioner to determine accurately the value of such property.

I have the honor to acknowledge the receipt of a copy of an order adopted by the Honorable House of Representatives, April 26, 1900, requiring the opinion of the Attorney-General upon the

To the House
of Representa-
tives.
1900
May 4.

following question: "Would the enactment of the 'Bill to incorporate the New England Cotton Yarn Company,' now before the House, afford said corporation, under any circumstances, the opportunity, in the issue of its securities, to practise what is commonly known as stock watering?"

Massachusetts has for many years undertaken to prohibit the issuance of stock by corporations organized under its laws excepting for equivalent value in cash or property. Pub. Sts., c. 106, §§ 47, 48. Before 1894 it had never attempted to regulate the investment or disposition of the capital stock so paid in; but in that year certain statutes were enacted, commonly called the anti-stock-watering statutes, which undertook, as to certain public-service corporations, to regulate not only the paying in, but, to a certain extent, the expenditure, as well, of the capital stock of such corporations. They are: St. 1894, c. 450, relating to gas and electric light companies; c. 452, relating to telegraph, telephone, aqueduct and water companies; c. 462, relating to railroad and street railway companies; and c. 472, relating to the increase of the capital stock of the foregoing corporations. These statutes provide, in substance, that only so much capital stock be issued by such corporations as is shown to the satisfaction of the board having charge of such corporations to be necessary for the purposes for which it is authorized, and also that it shall not be expended for any other purpose.

On the other hand, corporations formed for the carrying on of private business, in which citizens generally are interested only as possible creditors, are, under our general laws, left free from any supervision or interference by the Commonwealth in the conduct of their business. The State requires only that they begin business with a fully paid capital stock. How they shall expend proceeds of the stock so paid in, is left to the officers of such corporations, under the supervision of their stockholders, and with the right, in certain cases, of investigation by creditors if there has been improvidence or fraud. For example: when a cotton mill is organized, the general laws undertake to require that the corporation shall not begin business until its capital stock is fully paid in; but how it shall expend its money, how

much it shall pay for plant, for supplies or for labor, are questions left wholly to the regulation of the corporation and its officers, so far as the State is concerned. Another example of this distinction may be found in the bill under consideration. Section 5 provides for the redemption, at the election of the corporation, of its preferred shares at a fixed value. This provision, however, has to do only with the expenditure of the capital stock and not with the original paying in of such stock.

It is entirely possible, therefore, under our laws, for a corporation to begin business with a capital fully paid in, and yet afterwards so to mismanage its affairs and misspend its capital that the property which its capital stock is supposed to represent disappears in whole or in part. But this is not stock watering, in the strict sense of that term, which means only the issuing of stock which does not represent value received, at the time it is issued.

When, if ever, the State enters upon the difficult task of supervising the conduct of the business of private corporations, as it already has of public-service corporations, and of the investment of their capital stock, it will undoubtedly be by general laws applicable to all such corporations. In view of this well-settled policy of the Commonwealth, I assume that the question submitted by your honorable body relates only to the paying in of the original capital stock and of any increase thereof, and has nothing to do with the possible results of the carrying on of its business, — results common to this and to all other private corporations. So interpreted, the question submitted is, practically, whether the bill permits the corporation to issue capital stock that does not represent full value paid in, either in cash or in property.

The proposed corporation is expressly made subject by the bill to all the duties, restrictions and liabilities contained in all general laws now or hereafter in force relating to such corporations, except as therein provided. The exceptions referred to are: first, that by the second section the original capital stock is fixed at one million dollars; whereas, under the general statutes, the capital stock of a manufacturing corporation is fixed by the incorporators, and may be any sum not less than five thousand dollars; and,

second, that the capital stock may be divided into preferred and common shares, as the corporation may determine. The general law contains no reference to preferred shares. The bill also authorizes the corporation to purchase the property of the New England Cotton Yarn Company, a corporation organized under the laws of the State of New Jersey. So far as this purchase is to be made by the issuing of shares of stock, it is governed by the general provisions of law relating to the paying in of capital stock. None of these special provisions affect the question submitted; and it is, therefore, to be determined by a consideration of the provisions of the general laws relating to such corporations, and how far they are effectual to prevent the issuance of stock for less than the par value thereof.

Pub. Sts., c. 106, § 46, provides, in substance, that no manufacturing corporation shall commence the transaction of business until the whole amount of its capital stock has been paid in, and a certificate to that effect and of the manner in which the same has been paid in, and at the time of making the certificate been invested or voted by the corporation to be invested, signed and sworn to, has been filed in the office of the Secretary of the Commonwealth.

Section 48 provides that "conveyance to the corporation of property, real or personal, at a fair valuation, shall be deemed a sufficient paying in of its capital stock to the extent of such value, if a statement, made, signed and sworn to by its president, treasurer, and a majority of its directors, giving a description of such property and the value at which it has been taken in payment, in such detail as the commissioner of corporations shall require or approve, and endorsed with his certificate that he is satisfied that said valuation is fair and reasonable, is filed with the Secretary of the Commonwealth."

These provisions apply to the original capital stock of the proposed corporation, and, by § 4 of the bill, they govern any increase of capital stock which may from time to time be made by the corporation. It follows that both the original capital stock and any increase thereof must be made in cash or in property the equivalent of cash, at a fair valuation; the question of such fair-

ness being submitted to the determination of the Commissioner of Corporations, whose decision in the matter is final and binding upon all parties.

Whether stock may be issued which does not represent full value depends in this case, as in the case of all manufacturing corporations organized under the general law, upon the ability of the commissioner to determine accurately the value of the property taken in exchange for shares issued. If the valuation fixed by him is the true value of the property taken, the stock issued therefor will be fully paid for. If he fixes too high a value upon the property conveyed, the stock issued in exchange therefor to that extent will be watered stock, in the sense that it does not represent actual equivalent property. How far the provisions I have referred to, have been found to be effectual to prevent manufacturing corporations from issuing watered stock, and how far they will operate to the same end in the case of the corporation in question, are questions of fact which it is not my province to determine.

METROPOLITAN WATER BOARD — CITIZEN LABOR — PREFERENCE — NINE-HOUR LAW — WEEKLY PAYMENTS.

The word "preference," as used in St. 1895, c. 488, § 31, requires the employment of citizens only when they can be employed upon as advantageous terms as aliens.

Where laborers are regularly employed by contractors upon public works for more than nine hours per day, payment being per hour for the time during which they actually work, it is not a violation of St. 1894, c. 508, § 7.

Even where the laborers are told that they can only be employed upon their agreement to work more than nine hours per day, for so much per hour, and they accept the employment upon such terms, it is not a violation of that statute.

The statute requiring the weekly payment of employees (St. 1894, c. 508, §§ 51-54, amended by St. 1899, c. 247) does not include the employment of labor by the Commonwealth or its officers.

While, under existing statutes, your committee has no right to the opinion of this office, the questions you submit relate to a matter specially committed to you by the Legislature, and appear to me to be fairly entitled to my consideration.

To the Joint
Special Com-
mittee of the
Legislature.
1890
May 14.

1. "Section 31 of c. 488 of the metropolitan water act provides that in the construction of the metropolitan water works 'prefer-

ence in employment shall be given to citizens of this Commonwealth.' If it appears that citizen labor of this Commonwealth can be hired in sufficient numbers at not less than \$1.50 per day per laborer, and equally efficient alien labor at \$1.35 per day, does the clause referred to above require that, other things being equal, employment shall be given by the Metropolitan Water Board in doing its work, to citizen laborers?"

To this I answer No, for reasons stated in my reply to the next question.

2. "Please state what is meant by the clause 'preference in employment shall be given to citizens of this Commonwealth.' "

In my judgment, the word "preference" as used in the statute referred to requires the employment of citizens when such labor can be employed upon as advantageous terms as alien labor. If aliens are willing to do as good work more cheaply, the duty of preference does not require the employment of citizens at a higher rate of wages.

3. "Is the employment of laborers by contractors on public works more than nine hours per day, regularly, a violation of the law, the laborers being paid so much per hour for the time during which they actually work?"

To this question I answer No. St. 1894, c. 508, § 7, which provides that "Nine hours shall constitute a day's work for all laborers," etc., refers only to employment by the day. It does not and is not intended to prohibit the employment of labor by the hour, if the laborer is willing to be so employed.

4. "Is such employment of laborers unlawful if the continuance of their employment is dependent upon their willingness to work more than nine hours per day?"

If a laborer is told that he can only be employed upon his agreement to work more than nine hours per day at a given rate per hour, and accepts the employment upon such terms, such employment is an evasion of law, but not, in my judgment, a violation of it. Being a penal law, it is to be construed strictly. A person so employed, however powerful the inducement, is, nevertheless, in contemplation of law, working voluntarily, and the case, so far as the statute is concerned, is the same as though no

such threat were held out to him. Employment by the hour is not within the statute.

5. "Is the payment by the Metropolitan Water Board of the persons directly employed by the Board monthly, or in any other way than weekly, unlawful?"

St. 1894, c. 508, §§ 51-54, as amended by St. 1899, c. 247, do not include the employment of labor by the Commonwealth or its officers.

STATE HIGHWAY — FILING OF PLANS — LAY-OUT — DISCONTINUANCE — ERRORS.

The Massachusetts Highway Commission, after a State highway has been laid out and the required plans and certificates have been filed in the offices of the town and county clerks, have no authority to discontinue such highway or any part of it.

In general, however, mere clerical errors may be corrected at any time.

Your letter of November 17, 1899, requires the opinion of the Attorney-General as to the powers of the Massachusetts Highway Commission with reference to correcting errors or making changes in State highway lay-outs after the plans and other papers have been filed in the offices of the town and of the county clerks.

To the Massachusetts
Highway
Commission.
1900
May 21.

I am informed that the specific case which gave rise to this question is as follows: Your commission filed a plan defining the width of land taken for a State highway. Since the plan was filed, the commission have determined that the width defined is greater than is necessary for the purpose of the highway; and, as the abutters are willing to have the surplus width reconveyed to them, the commission are desirous, if permissible, to abandon such land as they find to be unnecessary for the highway.

St. 1897, c. 355, § 1, amending St. 1894, c. 497, § 2, provides that "Said highway commission shall consider such petition . . . and, if they deem that the highway should be laid out or be taken charge of by the Commonwealth, shall file a certified copy of a plan thereof in the office of the county commissioners of the county in which the petitioners reside, with the petition therefor, and a certificate that they have laid out and taken charge of said highway in accordance with said plan, and shall file a copy of the plan

and location of the portion lying in each city or town in the office of the clerk of said city or town, and said highway shall, after the filing of said plans, be laid out as a highway . . . by said commission, at the expense of the Commonwealth."

The plans and certificate so filed in accordance with the provisions of this section constitute the only record of the taking of the land by the Highway Commission. They are not working plans, for they do not purport to give detailed information as to grade, etc.; they only define the bounds of the land taken. No other act of taking is provided by the statutes; and I am of opinion, therefore, that the filing of the plans and certificate must be deemed to be the act of taking by eminent domain of the lands so defined, and that the taking is complete upon the filing of such plans and certificate.

The section quoted provides in the first instance for a determination by the commissioners that the highway should be "laid out;" and, as soon as such determination is reached, for carrying it into effect by filing plans and certificates therewith. The term "lay out" has acquired a technical meaning when used in connection with the highways in the legislation of this Commonwealth. "Laying' out is . . . the appropriate expression for locating and establishing a new highway." *Foster v. Park Commissioners*, 133 Mass. 321 (329). In the same case it is said by the court that "It is unnecessary to say that, after a way has been laid out, no additional order or adjudication is necessary to construct it." By the use of the expression "lay out as a highway," the Legislature means the passage of the order so to do. *Hitchcock v. Springfield*, 121 Mass. 382 (385). The filing of the plans, therefore, may be taken to be the technical "laying out" of the highway by the commission. The title to the land is then complete and the land taken has become a State highway. The same section, it is true, later provides that after the filing of the plans the State highway is to "be laid out as a highway;" but, inasmuch as no technical act of laying out is provided thereafterwards, I am of opinion that the words "lay out as a highway" are to be interpreted as meaning the actual construction of the way. Such a use of the term "lay out" is not wholly unknown to the statutes or to the decisions of the

courts. *See* St. 1871, c. 382, § 1, and *Hitchcock v. Springfield*, 121 Mass. 382.

The statutes contain no provision for discontinuance of a State highway by the Highway Commission. In this respect the statutes differ from the Public Statutes relating to the laying out of ways by county commissioners and by town officers. These statutes (Pub. Sts., c. 49) contain full provisions for discontinuing county or other ways. It must, therefore, be taken to be the intent of the Legislature that your Board should have no authority to discontinue or to give up a highway under the control of the Commonwealth. Having no power to discontinue a State highway, you have no power to discontinue any portion of it.

The question submitted inquires also as to the power of the commissioners to correct errors, which I understand to mean clerical or topographical errors. But upon the facts of the specific case submitted, it is not necessary to consider this branch of the question. In general, mere clerical errors may at any time be corrected, and I have little doubt of your power to do so, provided the substance of the original lay-out is adhered to.

STATE HIGHWAY — STREET RAILWAY — ALTERATIONS — APPORTIONMENT OF COST.

The Massachusetts Highway Commission cannot, under St. 1898, c. 578, § 16, make any apportionment of the cost of changes in location or alterations of street railway tracks ordered by the commission before the passage of that statute.

Your letter of March 16 states that the Highway Commission, in laying out a State highway in the town of Merrimac, in September, 1897, ordered the tracks of a street railway company to be removed from the centre of the location and relaid at a lower grade, and that this relocation involved the building of a retaining wall; that, the railway company having refused to build the wall, the commission, under the provisions of St. 1896, c. 541, made a contract for the building of the wall, and transmitted to the Auditor the bill for the amount, to be collected from the street railway company.

To the Massachusetts
Highway
Commission.
1900
May 21.

The commission now desire to know whether, acting under the

provisions of St. 1898, c. 578, § 16, the commission have any authority to make any allowance to the street railway company on this bill.

St. 1896, c. 541, provides that "Whenever in the construction of a state highway it becomes necessary, in the opinion of the Massachusetts highway commission, to change the location, relay or change the grade of that part of any street railway located on said highway, or to place different material between its tracks, or to make any other change in the location and construction of said railway, said commission may, in the manner provided in section twenty-two of chapter one hundred and thirteen of the Public Statutes for making such changes by boards of aldermen and selectmen, order the company owning or operating said railway to make such changes." The section further provides that the cost of making such alterations, whether by the railway company or by the commission, shall be paid by the commission and assessed by the Auditor upon the railway company. The commission obviously followed the provisions of this statute. The matter of payment of the bill is now in the hands of the Auditor and the Tax Commissioner, and the commission have no further responsibility, duty or rights in the matter.

St. 1898, c. 578, it is true, authorizes the commission, under certain circumstances, to apportion the cost of such alterations as may seem reasonable; but this statute is not retroactive, and does not affect rights and liabilities fixed before its enactment.

PAUPER — SETTLEMENT — REPEAL OF STATUTE — EFFECT OF REPEAL ON LIABILITY OF CITY OR TOWN.

A settlement gained under Gen. Sts., c. 69, § 1, cl. 5, and completed before the enactment of the repealing statute, which expressly saves "all acts done or rights accruing" before the repeal takes effect, is not lost or affected by such repeal. If by reason of a settlement a city or town has become liable for the support of a pauper, such liability is not taken away nor is the right of another city or town, or of the Commonwealth, to enforce such liability, destroyed because of the repeal of the statute under which the settlement was gained, if such repeal is not retroactive.

The material facts in the New Bedford case, as to which your letter of April 24 requires the opinion of the Attorney-General, are as follows: —

To the State
Board of
Charity.
1900
May 21.

The pauper in question, at present in the Epileptic Hospital, was born in New Bedford March 26, 1873. He has never acquired a settlement in his own right. His father was born in Whately in 1833, where he resided until 1859, then in different places, without acquiring a settlement in any of them, until 1865, when he removed to New Bedford, where he remained until some time after May 1, 1874. He only acquired a settlement, if at all, by his residence in New Bedford, where, from and including 1867, up to and including 1873, he was assessed for and paid taxes to an amount sufficient to bring him within the provisions of Gen. Sts., c. 69, § 1, cl. 5, which provided that "Any person of the age of twenty-one years, being a citizen of this or any other of the United States, and having an estate, the principal of which shall be set at two hundred dollars, or the income at twelve dollars in the valuation of estates made by assessors, and being assessed for the same, to state, county, city or town taxes, for five years successively in the place where he dwells and has his home, shall thereby gain a settlement therein."

The grandfather of the pauper was settled in Whately, dying in 1863, so that no settlement could be derived from him. The mother of the pauper had no settlement excepting that of her husband.

Upon the foregoing facts, the father of the pauper clearly acquired a settlement in New Bedford under the provisions of Gen. Sts., c. 69, § 1, cl. 5, above quoted; and the pauper, not having acquired any settlement of his own, took by derivation the settlement of his father under the provisions of Pub. Sts., c. 83, § 1, cl. 2. I understand, however, that it is claimed on behalf of New Bedford that the provisions in the General Statutes, above referred to, under which he acquired his settlement, having been repealed, the settlement became void, and that, at least, whatever rights might have accrued to the Commonwealth against New Bedford under it, cannot now be enforced.

St. 1878, c. 190, which repealed the section in question, provided in the repealing clause (§ 5) for saving "all acts done, or rights accruing, accrued or established, or proceedings, doings or acts ratified or confirmed, or suits or proceedings had or commenced, before the repeal takes effect." This statute of 1878

was re-enacted in the Public Statutes as c. 83, and it is expressly provided, in Pub. Sts., c. 223, § 4, that the repeal of prior acts "shall not affect any act done, or any right accrued or established, etc., before the repeal takes effect."

The settlement of the father, having been completed before the enactment of the statute of 1878, is, therefore, not affected or lost by the repeal of the section under which it was acquired.

I am unable to understand the force of the further contention that, although the settlement may still exist as to the pauper, the Commonwealth has no means of enforcing rights under it as against municipalities. If a city or town has become liable for the support of a pauper by reason of a settlement in such city or town, its liability for such support is not taken away, nor is the right of another town or of the Commonwealth to enforce such liability destroyed, because of the repeal of the statute, the repeal not being retroactive.

STATE HIGHWAY — STREET RAILWAY — ALTERATION OF LOCATION — REQUIREMENT OF PAVING.

The Massachusetts Highway Commission has no authority to require of a street railway, upon a relocation of its tracks ordered by the commission, that "the space between the rails, and eighteen inches on the outside of each rail, shall be paved with block paving."

To the Massachusetts
Highway
Commission.
1900
May 25.

Your letter of December 30, 1899, encloses a copy of a decree issued by the commission to the Wakefield & Stoneham Street Railway Company, dated November 10, 1899, referring to the location and care of its tracks on the State highway in Reading, which decree was amended by vote of the commission passed December 1, 1899. The question submitted by your letter is whether that part of the decree which, as amended, provides that "Where said tracks cross the State highway the space between the rails and eighteen inches outside of each rail, for the width of twenty-one feet over the State highway macadam and shoulders, shall be paved with block paving," is within the jurisdiction of the commission. I am informed that a location

had been granted to the railway in question before the way was taken in charge by the Highway Commission as a State highway, and that its tracks had been laid thereon under a franchise granted by the selectmen of Reading. The decree in question is for a relocation of said tracks, made upon petition of the selectmen of the town of Reading, after due notice and public hearing.

The commission undoubtedly has general jurisdiction to order a relocation of tracks which were upon a State highway before the same was laid out as a State highway. By St. 1898, c. 578, § 24, the State Highway Commission is given the same authority with regard to the location and maintenance of street railways located before the street is taken charge of by the commission as is conferred upon boards of aldermen and selectmen, "such authority to be exercised in the same manner, subject to the same provisions, and subject to the same rights on the part of abutters and street railway companies, as are herein provided with respect to the relocation and maintenance of street railways in public ways not under the jurisdiction or charge of said commission." The Board, therefore, has the power vested by the statute of 1898 in selectmen of towns as to street railways, but no more; and the reply to the question contained in your letter is determined by a consideration of the powers vested in municipal boards relating to such matters.

St. 1898, c. 578, § 16, contains the authority for the action of your Board, it being the section which authorizes municipal boards to alter the location of tracks. It authorizes the alteration of the location of tracks "in the manner and subject to the provisions contained in section fifteen." Section 15, which relates to the extension of street railway locations, authorizes municipal boards to grant such extensions, to prescribe the manner in which the tracks shall be laid, and the kind of rails, poles, wires and other appliances which shall be used. It provides, further, that the board "shall not impose as terms or conditions of such grant any obligations other than or in addition to those applying to all street railways under the general law in force at the date of the passage of this act, or such as may have been imposed in the

original grant of location to such company in such city or town subsequent to the passage hereof." As this location was granted prior to the passage of the statute of 1898, no obligation may under this section be imposed upon the street railway company other than or in addition to those applying to all street railways as the law stood before the passage of the act.

It becomes necessary, therefore, to decide whether so much of the order of your Board as requires that the space between the rails, and eighteen inches on the outside of each rail, shall be paved with block paving, is an obligation authorized by the general statutes relating to street railways prior to 1898. I know of no such authority. There was nothing in the general street railway law (Pub. Sts., c. 113) which imposed upon street railway companies any duty of paving either between the rails or outside thereof. Section 32 required them to keep in repair the paving and other surface material of the portions of streets, roads and bridges occupied by their tracks; and, if such tracks occupied unpaved streets, to keep in repair eighteen inches on each side of the portion so occupied by the tracks. This, however, was very far from imposing upon street railway companies the duty of paving between their rails or outside of them.

It has without doubt been commonly understood by municipal boards that in granting franchises under the street railway law they had the right to impose obligations upon the company receiving the franchise. Many franchises have been granted in which the company was required to pave not only the portion of the track between the rails, but a part or the whole of the way outside the rails. Other franchises have imposed pecuniary obligations of various kinds. All these, however, were, in my judgment, without authority of law. In granting locations and extensions of locations they were authorized only to impose such *restrictions* as they deem the interest of the public might require. Pub. Sts., c. 113, §§ 7, 21. Regardless of what the practice has been under this section, I am of opinion that an obligation involving the expenditure of money or a tax in any form upon the street railway company is not a restriction within the meaning of that word as used in the sections referred to.

In granting street railway locations under the old law, municipal boards acted solely as agents of the public. No city or town was ever given the authority to grant street railway franchises in its streets. Such streets are not the property of the cities and towns in which they are situated,— they belong to the public. They are free to all citizens, and the absolute power of authority over them belongs to the Commonwealth,— the only corporation authorized to represent the public. At first street railway locations were made the subject of express grant by the Legislature. Later, as they became more frequent, it was deemed expedient to provide for the establishment of a tribunal which would represent the Commonwealth, having authority to grant or to refuse locations, as the interests of the public might require.

The delegation of this authority to boards of aldermen in cities and to selectmen in towns did not confer any rights in respect to such grants upon cities and towns themselves. The officers so delegated act not as agents of the cities and towns, but as representatives of the Commonwealth, guarding the interests of the public. They had no right to bargain and sell street railway franchises, nor to make terms with street railway companies which should accrue to the financial benefit of the cities and towns in which the locations were given. They could not make a binding contract, either for a time limit of the franchise or for the payment of any revenue directly or indirectly to the Commonwealth or to a city or town.

A comparison of the old with the new railroad law may serve to illustrate this distinction. Under the old law (Pub. Sts., c. 113, § 7), the municipal boards were authorized to grant or refuse locations “under such restrictions as they deem the interests of the public may require.” Similar language governs their action in respect to extensions of the original location. The present law (St. 1898, c. 578, § 13), on the other hand, expressly authorizes the municipal boards to “impose such other terms, conditions and obligations in addition to those applying to all street railways under the general provisions of law as the public interest may in their judgment require.” The distinction between the two is material. The word “restrictions,” as used in the former law,

was obviously intended to signify such limitations upon what otherwise would be an unrestricted grant, as they might deem to be for the interest of the public. For example, provisions as to the kind of rails to be used, the time of completion of the work, the rates of fares to be charged, the number of cars to be run, and the portions of the streets in which tracks should be laid, would be "restrictions" for the benefit of the public, and which municipal boards under the old law would be authorized to impose.

The existing law, on the other hand, was undoubtedly framed to give the right to municipal boards to make contracts for the location of franchises which should enure to the benefit of the cities and towns in which such locations were granted. It was obviously intended to legalize what had been the practice of municipal boards under the former law, and to allow boards, in granting franchises, to put such burdens upon the railway companies for the benefit of the municipalities as they deem wise.

It follows, therefore, that, under the law prior to the statute of 1898, municipal boards had no authority to impose upon street railway companies the burden of paving any portion of the streets in which locations were granted to them, and that in requiring such an obligation your Board has exceeded its authority. By § 11 of the later law, whenever the tracks of a street railway company are altered and the surface material is thereby disturbed, the company must at its own expense replace the surface material with the same form of construction as that disturbed. No other duty is incumbent upon it, and no other obligation can be imposed relating to the surface of the way.

CIVIL SERVICE — VETERANS PREFERENCE ACT.

The provisions of the civil service legislation relating to soldiers and sailors are limited to such soldiers and sailors as served during the civil war in the army or navy of the United States, and were honorably discharged therefrom.

St. 1896, c. 517, is a general act relating to the preference of veterans in the civil service. It repeals all previous legislation on the subject, excepting so much of the original civil service

To the Civil
Service Com-
mission.
1900
May 28.

act (St. 1884, c. 320) as relates to such exemptions. In the original statute (St. 1884, c. 320, § 14, cl. 6) the language is: "applicants who served in the army or navy of the United States in time of war, and have been honorably discharged therefrom." In the statutes of 1896 the word "veteran," which is used throughout the statute, is defined in the first section of the statute to mean "a person who served in the army or navy of the United States in the time of the war of the rebellion, and was honorably discharged therefrom."

Your letter of May 18 submits the question whether the expression above quoted, as used in the original statute, is to be taken to have the same meaning as the word "veteran" used in the statute of 1896; or whether the term is to be construed, as it may be literally, to include those who served in the recent war with Spain, and have been honorably discharged from such service. Your letter inquires further as to whether the existing difficulties in the Philippine Islands amount to war within the definition of that term, as used in the statute first above quoted. In view of the conclusions at which I have arrived upon the main proposition submitted, it is not necessary to consider the latter question.

The expression originally used in St. 1884, above quoted, to wit, "applicants who served in the army or navy of the United States in time of war and have been honorably discharged therefrom," was used again in St. 1887, c. 437. In St. 1889, c. 473, the language was: "Persons . . . who *have* served in the army or navy of the United States in time of war and been honorably discharged therefrom." In St. 1894, c. 519, the language is: "No person who *has* served in the United States army or navy in time of war, and been honorably discharged therefrom," etc. This act is entitled "An Act relative to veterans employed in the civil service of cities." This is the first use of the word "veterans" in civil service legislation.

The next statute relating to the subject was St. 1895, c. 501. This chapter was declared unconstitutional by the Supreme Judicial Court in *Brown v. Russell* (166 Mass. 14), but may properly be considered with the other acts upon the subject in

ascertaining the intent of the Legislature. In this act the word "veteran" was defined in the same terms as in the statute of 1896, above quoted. By St. 1896, c. 517, above referred to, this statute was amended to conform to the opinion of the court in *Brown v. Russell*.

All these statutes are to be regarded as one body of legislation, relating to the same subject, enacted for the same purpose and for the benefit of the same class.

The language originally used might be so construed as to include not only those who had served in the army or navy in time of war before the passage of the act, but any one who after its passage had so served and should thus be brought within the designation of the act. In view, however, of all the attendant circumstances, this cannot be said to have been the intent of the Legislature. There can be no doubt that the Legislature had only in mind the veterans of the civil war. It is not conceivable that they were legislating for the future. But, even if the earlier legislation left this in doubt, all ambiguity is removed by the later statutes referring to the same subject-matter, enlarging the benefits of the earlier statutes, and being in effect a continuance of previous legislation. These expressly defined the word "veteran" in such a way as to make it clear that all the legislation is, and is intended to be, only for the benefit of the veterans of the civil war. For example, St. 1884, c. 320, § 14, cl. 6, speaks of persons "who served in the army or navy," etc., and the statute of 1896 of "veterans." If the first statute referred to one class of persons and the last statute to another, the result would be an absurdity which I cannot believe the Legislature could have intended.

I am of opinion, therefore, that no part of the civil service legislation relating to soldiers and sailors is to be construed to mean those who since its passage have served in the army or navy in time of war, but that its provisions are limited to those who served in the army or navy during the civil war, and were honorably discharged therefrom.

This conclusion receives much confirmation from the fact that the General Court of 1899 enacted a statute extending the ex-

emptions in favor of veterans in the civil service statutes to those who served in the Spanish war. This act was vetoed by the Governor, and his veto was sustained by the Legislature. Another bill to the same end has recently been rejected by the Legislature now in session. While these proceedings do not authoritatively settle the true construction of the earlier statutes, they are of importance, as strengthening the view that all the provisions of the civil service acts relating to the subjects had to do only with the veterans of the civil war.

PAROLE LAW — CONVICT — SUCCESSIVE SENTENCES.

A convict who has received successive sentences, imposed either prior to the expiration of, or previous to his commitment upon, his first sentence, is not entitled to the provisions of St. 1894, c. 440.

Your letter of May 10 submits two questions touching the construction of St. 1894, c. 440, to wit:—

"First. — Is a prisoner who has received two sentences, each of which was imposed prior to the expiration of his first sentence, entitled to the provisions of this act?

"Second. — Is a prisoner who has received two sentences, each of which was imposed previous to his commitment upon his first sentence, entitled to the provisions of this act?"

The statute in question has been amended, and the law as amended appears in St. 1897, c. 206, as follows: "When it shall appear to the commissioners of prisons that any prisoner held in the state prison upon his first sentence thereto has reformed, they may . . . issue to him a permit to be at liberty during the remainder of his term of sentence, upon such terms and conditions as they deem best, and they may revoke said permit at any time previous to its expiration."

In a letter submitted to the Prison Commissioners, dated April 4, 1896 (1 Op. Atty.-Gen., 324), I stated it as my opinion that the "statute is inapplicable to the first sentence, taken by itself. It cannot be presumed that the Legislature intended that a prisoner should be at large, engaged in the business of reformation,

To the Com-
missioners of
Prisons.
1900
May 29.

for a period of years, at the expiration of which he should return to enter upon a second sentence."

The statute is in terms inapplicable to the second sentence, for at the time he is serving his second sentence it cannot be said that he is held in state prison upon his first sentence.

I beg to repeat the suggestions contained in my former opinion, to wit, that "the matter of successive sentences seems not to have been considered in this law," and that "there seems to be need of further legislation upon the subject."

TRUST COMPANY — LOAN TO SINGLE INDIVIDUAL.

Under St. 1888, c. 413, § 17, a trust company may not loan to one individual, whether a person, firm or corporation, more than twenty per cent. of the capital stock of the company, even though a portion or the whole of the indebtedness is secured by pledge of marketable collateral.

To the Board
of Savings
Bank Com-
missioners.
1900
May 29.

St. 1888, c. 413, § 17, is as follows: "The total liabilities to such corporation of any person, firm or corporation, other than cities or towns, for money borrowed, including in the liabilities of a company or firm the liabilities of its several members, shall at no time exceed one-fifth part of such amount of the capital stock of this corporation as is actually paid up. But the discount of bills of exchange drawn in good faith against actually existing values, and the discount of commercial or business paper actually owned by the person negotiating the same, shall not be considered as money borrowed."

I am of the opinion that, in view of the prohibition of the section quoted, a trust company may not loan to one individual more than twenty per cent. of the capital stock of the company. Even if a portion or the whole of the indebtedness is secured by pledge of marketable collateral, it is still a liability of the person signing the note, within the meaning of the section.

A loan secured by a pledge of marketable collateral is not within the exceptions of the section. It is not a discount of a bill of exchange drawn against actual existing values, or a discount of commercial paper owned by the person negotiating

the same. Both these exceptions are well understood in commercial affairs, and neither of them includes ordinary loans upon collateral security.

STATE BOARD OF AGRICULTURE — TREE WARDENS — DESIGNATION OF PUBLIC SHADE TREES.

St. 1899, c. 330, a codification of the laws relative to the preservation of shade trees, which makes it obligatory upon towns to elect a tree warden, supersedes the authority over such trees conferred by earlier statutes upon selectmen or other town officers.

Since c. 330, defines public shade trees as "all shade trees within the limits of any public way," it has the effect to relieve the Board of Agriculture from the obligation, imposed by St. 1890, c. 196, as amended by St. 1891, c. 49, to supply M-spikes to towns for the purpose of designating such shade trees as are to be considered public shade trees.

St. 1899, c. 330, is entitled "An Act to codify and amend the laws relative to the preservation of trees." The act itself does not follow the older and better custom of specifically repealing the statutes which are superseded by its provisions, nor even the more recent method of repealing all acts inconsistent therewith. But the title of an act may assist in its interpretation; and I have no doubt that the intention of the Legislature is sufficiently expressed, both in the body of the act and in the title, to enact a new and general law relating to shade trees in towns and thereby to supersede all previous statutes, unless they relate to some matter clearly not covered by the codifying statute.

To the State
Board of
Agriculture.
1899
June 9.

The statute in question makes it obligatory upon towns to elect a tree warden, and authorizes him and his deputies to have the entire charge of public shade trees within the limits of the town. It must be taken, therefore, to supersede the authority conferred by earlier statutes upon selectmen or other town officers. It cannot be supposed that the law intended conflicting jurisdiction.

Referring specifically to the statutes mentioned in your letter: St. 1893, c. 78, which is an act relating to the extermination of insect pests, is re-enacted in § 4 of the statute of 1899. St. 1893, c. 403, relating to and prohibiting the affixing of posters, labels,

etc., upon public shade trees, is superseded by §§ 5, 6, and 7 of the later statute. St. 1893, c. 423, which is a general act relative to the powers and duties of town officers, provides, in the section relating to the duties of the superintendent of streets, that he shall have full charge of the care and preservation of shade trees. This is, of course, repealed by the codifying statute in question. St. 1896, c. 190, provided for the election of a tree warden. This obviously is no longer in force since the enactment of St. 1899, c. 330. The same may be said of St. 1897, c. 428, relating to the powers of tree wardens and park commissioners in towns.

On the other hand, Pub. Sts., c. 52, § 10, as amended by St. 1885, c. 123, § 2, relates only to the cutting down of such trees and shrubbery, etc., as interfere with public travel. This is not affected by the statute of 1899, except so far as it concerns shade trees.

My attention has also been called to St. 1897, c. 254, entitled "An Act to provide for the further protection of trees and for the prevention of fires in woodlands." This act establishes the office of forester in towns accepting its provisions, and makes it his duty, among other things, to have charge of all trees within the limits of a public highway. In respect to such duties the act is superseded by the codification of 1899. The only portion of the act thus affected is the last part of § 1 and the whole of § 2. The codification does not repeal the statute in other respects.

Your letter further inquires as to the effect of the codifying statute in question upon St. 1890, c. 196. This act authorizes the mayor and aldermen of cities and the selectmen of towns to designate and preserve trees within the limits of the highways for the purposes of ornament and shade. It further requires the officers named to drive into the trees so designated a spike with a head with the letter M plainly impressed upon it. The act also provides a penalty for interference with the spikes so affixed.

This statute is still in force as to cities, for the statute of 1899 refers only to towns. But I am of opinion that it is no longer applicable to towns. St. 1899, § 2, expressly defines shade trees as follows: "All shade trees within the limits of any public way

shall be deemed public shade trees." There is, therefore, no further need of designating shade trees by any such distinguishing mark; and, under the powers granted to the tree wardens, the selectmen have no longer any right of interference or control. I am of opinion, therefore, that you are not called upon to furnish M-spikes to towns, but that as to cities the law remains unaffected.

BOARD OF HARBOR AND LAND COMMISSIONERS — WEST'S
BEACH CORPORATION — LICENSE TO CONSTRUCT PIER —
ULTRA VIRES ACT.

The Board of Harbor and Land Commissioners may grant to the West's Beach Corporation a license to construct a pier on and over its beach into tide water, for the purpose of increasing the landing facilities for boats.

Whether the construction of such wharf, as proposed by the corporation, would be *ultra vires*, is not a question within the scope of the duties of the Board.

There would seem to be no reason, however, why the corporation may not, if licensed by the Board, construct such wharf, its object being merely to facilitate the members of the corporation in their lawful occupation of the beach.

West's Beach Corporation was incorporated by St. 1852, c. 157. The object of its formation was to enable the holders of common rights on West's Beach to preserve their rights and prevent encroachment by others. Section 2 of said act provided that: "The said corporation are hereby authorized to take and hold all that portion of the sea-shore, beach and flats at Beverly farms in said town of Beverly, which is included within the following limits;" a description of the territory by metes and bounds follows. Section 3 is as follows: "The members of said corporation may use and occupy said described portion of sea-shore, beach, and flats, for the purpose of gathering drift-stuff and sea-weed, and of boating and bathing, as said premises have heretofore been used and occupied by them and their predecessors."

The charter was amended by St. 1866, c. 131, but not in a way to affect the question submitted by your letter; which is, whether your Board has the right to grant to the corporation a license to construct a pier on and over its beach into tide water, for the purpose of increasing its landing facilities for boats.

To the Board
of Harbor and
Land Com-
missioners.
1900
June 14.

Your Board has authority to grant such a license under Pub. Sts., c. 19, § 9, and the provisions of that section would appear to dispose of the question submitted. But I understand, from statements, by members of your Board, that the real question is, whether the construction of a wharf, as proposed by the corporation, would be beyond the powers and privileges granted to it.

I doubt very much whether the question of *ultra vires* as to the corporation is for the consideration of your Board. It touches the construction of its charter, and can properly be raised only by the sovereign granting the charter. The scope of the duties of your Board does not embrace such questions.

However, I have no hesitation in saying that I see no reason why, if duly licensed by your Board, the corporation may not build the wharf proposed; its object being merely to facilitate the purpose of its incorporation, by affording better facilities of landing from row boats, sail boats and such craft as the members of the corporation may use in their lawful occupation of the beach.

MEMBER OF LEGISLATURE — ELIGIBILITY FOR OTHER OFFICE —
INSPECTOR OF ALMSHOUSES.

The provisions of c. 2, § 33, of the Public Statutes, do not prevent the State Board of Charity from appointing a member of the Legislature as its agent to inspect almshouses, in accordance with St. 1900, c. 215, since such office is not a public office within the meaning of that section.

To the State
Board of
Charity.
1900
June 14.

Pub. Sts., c. 2, § 33, is as follows: "No member of the senate or house shall, during the term for which he is elected, be eligible to any office under the authority of the commonwealth created during such term, except an office to be filled by vote of the people."

Chapter 215 of the Acts of the present year authorizes the State Board of Charity to visit and inspect all almshouses maintained by the several cities and towns in the Commonwealth, and to report annually upon their condition and management, with such suggestions and recommendations as the Board may deem expedient.

Acting under the authority of Pub. Sts., c. 79, § 2, which authorizes the Board to assign any of its powers or duties to agents appointed for the purpose, and to execute any of its functions by such agents, I understand that your Board desires to appoint a member of the General Court of this year to be inspector of almshouses, — an office created by the Board, in consequence of the enactment of the statute of this year.

The statute of this year creates no new office. It merely imposes additional duties upon public officers already in the service of the Commonwealth. Those officers had already been authorized by a previous statute to employ agents to assist them in the performance of their duties, but the agents so employed are not public officers, within the meaning of that term as used in the Public Statutes. Your letter states that the person to be appointed will be inspector of almshouses. There is, however, no such office known to the statutes: it is an office created and named by the Board.

I am of opinion, therefore, that the provisions of the Public Statutes above quoted do not prevent the Board from appointing a member of the present Legislature its agent to inspect almshouses, under the provisions of St. 1900, c. 215.

STATE HIGHWAY — COST OF MAINTENANCE — CONSTITUTIONAL LAW — IMPAIRMENT OF CONTRACT.

The provision of St. 1893, c. 476, that the maintenance of State highways shall be paid for by the Commonwealth, and not by the towns through which the ways are located, does not constitute a contract to that effect between the Commonwealth and such towns, and it is competent for a succeeding Legislature to change the burden of maintaining such highways in such manner as it sees fit.

I have the honor to acknowledge the receipt of a copy of an order adopted by the House of Representatives June 19, requiring the opinion of the Attorney-General upon the question whether the Commonwealth is legally bound to maintain and repair State highways taken as such under the provisions of c. 476 of the Acts of the year 1893, and whether the provisions of

To the House
of Representa-
tives.
1900
June 21.

House Bill No. 1399, relative to the repair of State highways, would, if the bill became a law, be void or illegal as being in violation of any contract or obligation entered into or assumed by the Commonwealth for the maintenance and repair of State highways taken as such under the provisions of said c. 476 or any amendment thereof.

Both questions depend upon the same considerations and can be conveniently considered together. The construction and maintenance of highways are matters of public concern, to be provided for by taxation in such manner under the Constitution as the General Court may from time to time provide. The Legislature of 1893, by the enactment of the statutes relating to State highways, provided that as to such ways the burden of their construction and maintenance should be paid for by the Commonwealth, and not by the towns in which the ways are located. But no contract was thereby created between the Commonwealth and the towns petitioning for the location of State highways under the provisions of the act, and it is competent for a succeeding Legislature to change the burden of support of State highways in such manner as it may see fit. There are no contractual relations in the matter between the Commonwealth and its various governmental divisions. It follows, of course, that the provisions of the proposed bill are not unconstitutional.

BOSTON & ALBANY RAILROAD COMPANY — LEASE — ISSUE OF STOCK.

So long as the proposed lease of the Boston & Albany Railroad Company may remain in force, there is no authority in any person or corporation to issue the balance of stock provided for in St. 1889, c. 163.

To the House
of Representa-
tives.
1900
June 28.

I have the honor to acknowledge the receipt of a copy of the order adopted by the honorable House of Representatives, June 25, as follows, to wit: —

“*Ordered*, That the Attorney-General be and hereby is requested to furnish the House of Representatives with an opinion as to who, if anybody, will have the right to issue the balance

of five millions of the ten millions of stock authorized by chapter one hundred and sixty-three of the acts of the year eighteen hundred and eighty-nine, being 'An Act to authorize the Boston & Albany Railroad Company to increase its capital stock,' if the Boston & Albany Railroad is leased to the New York Central & Hudson River Railroad Company; and if it may be issued he will give an opinion as to the conditions, regulations or terms under which such an issue may be made."

The balance of stock authorized by the act referred to is to be issued as specified in the act: "for the improvement of the alignment of its road; for the construction of additional tracks; for the purchase of land; for the separation of level crossings of highways and town ways; for the construction of new stations, and for the acquirement of private ways."

Under the lease, however, all these matters are specially provided for. All permanent improvements, the purchase of land, and other like matters, are to be paid for by the issuance of bonds of the lessor corporation, the interest on which bonds is to be paid by the lessee; and there is no authority in the lease for the issuing of shares by the lessor corporation. The lessor corporation, therefore, has no further occasion to issue shares under this act, and in my opinion its authority so to do is superseded by the provisions of the lease into which, by the assent of the Commonwealth, it has entered.

It is clear that the lessee corporation has no authority under the lease to issue stock of the lessor corporation. Although the lease purports to assign the "franchises" of the lessor, this cannot in my judgment be taken to include the franchise to issue additional stock. Such a franchise is inherently one belonging to the corporation alone, which it cannot assign without destroying its corporate integrity.

I am of opinion, therefore, that there is no authority in any person or corporation to issue the balance of stock authorized by St. 1889, c. 163, so long as the lease may remain in force.

BOSTON & ALBANY RAILROAD COMPANY — LEGISLATURE —
 AMENDMENT OF LEASE — CONSENT OF COMMONWEALTH —
 VIOLATION OF CONDITIONS — REVOCATION — LESSEE SUB-
 JECT TO GENERAL LAWS — SPECIAL BURDENS — CONTRACT
 — INTERSTATE FREIGHT TRAFFIC — CONSTITUTIONAL LAW.

Since the lease of the Boston & Albany Railroad Company is in form a contract between the parties, the Legislature cannot, by enactment, amend it.

The consent of the Commonwealth to such lease is in the proposed statute conditioned not upon the performance by the lessee of the obligations imposed, but upon the obedience of the lessee to a decree of the Supreme Judicial Court requiring such performance, which could be made only upon a finding that the lessee had assumed the duty for the neglect of which complaint is brought. No such duty having been assumed by the lessee, by agreement or otherwise, under this bill, the court would be without authority to decree its performance, and consequently the Legislature could not revoke its consent.

If the lessee, a foreign corporation, by the consent of the Commonwealth enters upon the exercise of a franchise within the jurisdiction of the Commonwealth, it subjects itself to all such general laws as the Legislature may constitutionally enact regulating the conduct of such franchise.

With regard to independent enactments, involving special burdens, the Legislature may impose conditions which accomplish the desired result if a contract for their performance is entered into by the lessee, either expressly or by implication.

If the lessee elects, under the conditional consent of the Commonwealth, to become bound under the lease, it also becomes bound by implication to perform the conditions upon which such consent is given.

A regulation by the Commonwealth of rates of freight from points without to points in and through the State is unconstitutional and void.

A private person, however, may make contracts with a railroad corporation, with reference to freight, which are not in violation of any act of Congress; and it would seem that the Commonwealth as a party would have the same right that a private individual would have to make a contract relating to interstate freight rates, subject to the regulations of Congress upon the subject.

To the House
 of Representa-
 tives.
 1900
 July 2.

I have the honor to acknowledge the receipt of copies of two orders adopted by the honorable House of Representatives on June 27 and June 28, respectively, submitting certain questions touching the construction of the bill (Senate, No. 226, as amended) giving the consent of the Commonwealth to the lease of the Boston & Albany Railroad, and to reply thereto as follows:—

First (order of June 27).—"Are the changes which Senate Bill No. 226 has made in the original House Bill No. 36 to be considered in the nature of amendments to the lease which has been entered into between the directors of the Boston & Albany

Railroad and the New York Central & Hudson River Railroad?"

The proposed lease is in form a contract between two railway corporations. Such a contract cannot be amended except by further agreement between the parties. The Legislature, therefore, cannot by enactment amend the lease.

Second (order of June 27). — "Do all the provisions of Senate Bill No. 226 constitute conditions of the lease, so that a violation of any part of the proposed statute, if adopted by the Legislature, would invalidate the lease itself?"

By the first section of the bill the consent of the Commonwealth is given in absolute terms to the proposed lease. How far this consent is qualified by succeeding sections will be considered later. In § 2 the Commonwealth expressly reserves all rights of control over the leased road which it has or may have by general laws, or under the charter of the Boston & Albany Railroad. This section is without doubt merely declaratory of the rights of sovereignty which the Commonwealth has over all franchises granted and exercised by its authority within its jurisdiction. Sections 3 to 6 inclusive undertake to impose certain specific duties upon the lessee. They are in form independent enactments, and are not expressed to be conditions upon which the lease is granted. Some of them without doubt are merely declaratory of duties which would be incumbent upon the lessee, whether expressly so enacted or not. But others of them, notably § 3, relating to interstate freights, and § 5, requiring the expenditure of a large sum of money in East Boston, impose burdens upon the lessee with which, in my opinion, the lessee cannot be charged without its consent.

It is obvious that the framers of the bill had doubts of the right of the Legislature to impose these duties upon the lessee as independent enactments, and §§ 8, 9 and 10 appear to have been drawn for the purpose of securing the performance of the duties so imposed. The scheme of these sections is, briefly, as follows: By §§ 8 and 9 the Attorney-General is authorized, when advised by the Railroad Commissioners that these provisions, or any other of those contained in the bill, have been violated by the lessee, to institute legal proceedings to compel the observance of

them; and the Supreme Judicial Court of the Commonwealth is given jurisdiction to entertain such proceedings and to enforce the performance by the lessee of the provisions of the bill. Section 10 thereupon provides as follows: "The consent and authority herein given by the Commonwealth is given upon condition that the final decrees and mandates of the supreme judicial court of this Commonwealth provided for in the foregoing sections of this act shall be complied with and observed by the lessee; and said condition shall be enforceable as follows and not otherwise, namely: upon any failure so to comply with and observe said decrees and mandates, notwithstanding any prior failure to observe and comply with any decree or mandate aforesaid, the consent and authority herein given may be revoked and annulled at any time by the general court."

If, therefore, the duties required of the lessee by the bill are not performed, two remedies at least are attempted to be given to the Commonwealth: one is to enforce performance of such duties by decree of the Supreme Judicial Court; the other is to revoke the consent given to the lease by the bill upon failure to obey such decree of the court. If the court has power to enter a decree for the performance of these provisions (omitting for the present any question of the right of removal of the proceedings to the Federal Court by the lessee, which will be considered later), the rights of the Commonwealth would seem to be sufficiently preserved. But the right of the court to enter such a decree must be based not only upon the provisions of the bill purporting to give it jurisdiction over the lessee, but also upon the fact, if it be a fact, that the lessee is bound under the terms of the bill or otherwise to perform the duties imposed by it. The court may, under the act, entertain jurisdiction of the Attorney-General's suit, and may by proper process hale the lessee before it; but the lessee will then have the right to claim that it never agreed to perform the duty the neglect of which it is charged with, and, if the court so holds, no decree can be entered, and the whole proceeding fails.

The vital question, therefore, is, whether the lessee is to be deemed to have consented to and to have agreed to perform the

obligations imposed upon it in the bill by entering upon the demised premises under the lease.

It is, to say the least, doubtful whether in its present form the bill can be so construed. It is to be observed that the consent of the Commonwealth is conditioned not upon the performance of the obligations imposed, but upon the obedience to a decree of the Supreme Judicial Court requiring such performance. As I have already remarked, the consent of the Commonwealth is given in absolute terms, except as to this sole condition, and the duties and obligations imposed upon the lessee are contained in enactments separate and independent, though parts of the same bill. The single condition attached to the consent, namely, that the lessee shall obey the orders of the Supreme Judicial Court, is very far from being equivalent to a condition that the lessee shall obey the provisions of the bill. If the latter be the intent of the Legislature, it can easily be expressed in unambiguous language, rather than in terms which seem even to avoid indicating any such intent.

I am of opinion, therefore, replying to the second question of the honorable House of Representatives, that a violation of any part of the proposed statute would not invalidate the lease itself. Briefly, to restate my reasons therefor, they are: that under its terms the lease could not be invalidated by a revocation of the consent of the Commonwealth, excepting upon non-performance by the lessee of a decree requiring such performance made by the Supreme Judicial Court; and that no such decree could be made, because the court would have no power to make it except upon a finding that the lessee had assumed the duty for the neglect of which the complaint was brought. No such duty having been assumed by the lessee, by agreement or otherwise, under this bill, the court would be without authority to decree its performance, and, consequently, the Legislature could not revoke its consent.

Although the matter is beyond the strict scope of the questions submitted, I deem it proper to call the attention of the honorable House of Representatives to another serious defect in the scheme of the bill as it stands. The right of revocation by the Legis-

lature is reserved only upon non-performance of a decree of the Supreme Judicial Court of this Commonwealth. The lessee, however, is a foreign corporation. Under the statutes of the United States it has the undoubted right to remove any civil proceeding brought against it to the federal courts. After such removal the power of the Supreme Judicial Court of the Commonwealth to make a decree would be taken away, and a decree entered in the Federal Court would not give to the Commonwealth the right of revocation, because such right by the terms of the bill is only created by disobedience to a decree of the State court. This, however, is a matter which can be taken care of by an amendment to the bill.

Assuming that the Legislature desires to bind the lessee to the performance of the obligations contained in the bill, it may be desirable for the Attorney-General to submit his views as to how such a result may be accomplished. The lessee is a foreign corporation. If by the consent of the Commonwealth it enters upon the exercise of a franchise, like the operation of a railway, within the jurisdiction of the Commonwealth, it undoubtedly subjects itself to all such general laws as the Legislature may constitutionally enact regulating the conduct of such franchise. But it is doubtful, to say the least, whether independent enactments, involving special burdens, the right to impose which does not arise from the police power of the Commonwealth,—such, for instance, as the provision regulating interstate freight rates, or the provision requiring the expenditure of a large sum of money in the construction of docks and terminal facilities, — are within the jurisdiction of the Commonwealth.

But, whether they are or not, the desired result is surely accomplished if a contract for their performance be entered into by the lessee. If, upon sufficient consideration, the lessee agrees with the Commonwealth that it will perform these duties, such an agreement, whether made in express terms or arising by implication from circumstances (not considering at this time any questions arising under the commerce laws of the United States Constitution), may be enforced in any court having jurisdiction of the parties and of the subject-matter.

How may such a contract be made? The most obvious and certain method is to require the express assent of the lessee to the conditions imposed by the Commonwealth. So far as the conditions imposed are constitutional, such an expressed assent would bind the lessee beyond peradventure; and it is the clear duty of counsel to discharge himself of responsibility for results by advising a client, who has a choice of methods, to select that which leaves no room for doubt.

But it is also incumbent upon me to say that a method less certain, though probably adequate to bind the lessee, would be so to frame the bill as to create an implied contract on the part of the lessee by the act of entry upon the demised premises.

The parties have seen fit to make the lease operative only when the Commonwealth has ratified it, and until such ratification neither party is bound by any terms of the contract, and if such ratification is withheld there is no contract. And if the ratification be conditioned upon terms which either party is not willing to accept, the lease is not binding upon such party, and may be treated as no lease. The Commonwealth has granted to the Boston & Albany Railroad Company a valuable franchise. It was a franchise, however, which the corporation has no right to surrender or assign. Permission by the Commonwealth to transfer to another corporation the franchise so granted is in itself a franchise valuable to the party receiving it, and for the granting of which the Commonwealth may properly demand and receive compensation. That the Commonwealth may barter its franchises is well settled. An illustration of this proposition is to be found in the statutes relating to the granting of franchises to street railway corporations, under which terms, in the discretion of the municipal body, acting as the agent of the Commonwealth, may be imposed as a condition of the grant. The Commonwealth, therefore, has the right to impose upon the parties, or either of them, seeking to have the franchise transferred, such terms and conditions as it may see fit to impose; and it may provide that its consent to such transfer shall be conditioned only upon the acceptance of such conditions by the parties, or by the party upon whom the burden of such conditions is imposed, and its

agreement to observe and perform them. Express assent, however, is not always necessary. It may be implied from acts. If the consent of the Commonwealth is clearly expressed to be upon condition of the performance of certain specific duties by the lessee, and it is further provided in express terms in the act granting the consent that the entry by the lessee upon the demised premises and into the enjoyment of the franchise so granted shall be taken and deemed to be an assent to the conditions imposed and an agreement to perform them, and thereupon the lessee does so enter, I am of the opinion that it thereby agrees by implication to perform the duties so imposed, and that such agreement may be enforced in the courts.

If the consent of the Commonwealth is qualified by conditions which must be accepted before the consent becomes effectual the lessee may thereupon elect to treat the lease as void. But if it elects under such consent to become bound by the lease, it also becomes bound by implication, in my opinion, to perform the conditions upon which such consent was given. A new contract in addition to the contract of the lease is thus made between the Commonwealth and the lessee, the consideration of which is the consent by the Commonwealth to the transfer of the franchise theretofore enjoyed by the lessor.

Third (order of June 27). — “Would the power of the Commonwealth to enforce against a foreign corporation, like the New York Central & Hudson River Railroad Company, the provisions of the act authorizing the lease, be as complete as if the lessee were a domestic corporation?”

Inasmuch as, in my reply to the second question as above submitted, I have advised the honorable House of Representatives that what are probably regarded as the most vital of the provisions of the bill as it stands cannot be enforced at all against the lessee, it seems unnecessary to reply specially to this question.

The order of June 28 requires the opinion of the Attorney-General upon the question, substantially, whether § 3 of the bill in question is in violation of Art. 1, § 8, of the Constitution of the United States, granting to Congress the power to regulate commerce among the several States. It is well settled that under this clause of the Federal Constitution the sole power to regulate inter-

state freight rates is in the Congress of the United States, and that it is of no consequence whether in any given case Congress has seen fit to exercise its power, or not. Failure to regulate rates is taken as an indication that Congress determines that there shall be no such regulation, and whether there has been such regulation or not by Congress, the State is powerless to pass any laws upon the subject. I am of the opinion, therefore, that § 3 of the Senate bill, considered as a regulation by the State of Massachusetts of the rates of freight from points without the State to points in or through the State, is unconstitutional and void, and cannot be enforced.

If, however, a contract, express or implied, is made between the Commonwealth and the lessee relating to the rates of freight, a very different question arises, and one upon which much can be said upon both sides. If such a provision be made, not as a legislative enactment but as one of the terms upon which the consent of the Commonwealth is granted, and such terms are assented to by the lessee, the result is a contract between the Commonwealth and lessee, under which the latter is limited in the amount it may charge for freights of the description named in the section. Assuming that such a contract were made, and assuming, further, that its provisions were so drawn as to leave the lessee subject to any regulations which might be made upon the subject by Congress, would such a contract be void?

With some hesitation I am inclined to the opinion that the Commonwealth as a party has the same right to make a contract relating to interstate freight rates, subject always to any regulations upon the subject that may be made by Congress, as a private individual might make with the same railroad. Obviously, the provisions of the Federal Constitution are not to be taken as restraining the power of the railroad corporation to make contracts with reference to freight that are not in violation of the provisions of any act of Congress. I see no sound reason to distinguish between such contracts with private persons and a contract upon sufficient consideration between the State and a railroad corporation. Such a contract would not be a legislative enactment, deriving its authority from the sovereignty of the Commonwealth, but would be the act of a State as a party part-

ing with rights, and receiving the agreement of the railroad in consideration therefor. The question, however, in view of the decisions of the Supreme Court of the United States, is not one free from doubt, and can only be finally determined when directly presented to that tribunal.

BOSTON & ALBANY RAILROAD COMPANY — LEASE — CONSENT
OF COMMONWEALTH — CONDITIONS — ACCEPTANCE BY LES-
SEE — MODIFICATION OF LEASE — FOREIGN CORPORATION
— FINANCIAL AFFAIRS.

A provision in the proposed statute to ratify the lease of the Boston & Albany Railroad Company, stipulating that the consent of the Commonwealth is not to take effect until the conditions imposed by the Commonwealth are accepted by the lessee by a corporate vote, is the most effectual way to insure the performance of the conditions by the lessee, and to reserve the right of revocation by the Commonwealth upon the failure of such performance.

The lease itself cannot be cancelled, amended or modified by the parties without the further consent of the Commonwealth.

The lessee, being a foreign corporation, is subject to the paramount authority of the State granting its charter, and its financial affairs cannot be made subject to direct legislation by this Commonwealth.

To the House
of Representa-
tives.
1900
July 6.

I have the honor to acknowledge the receipt of a copy of an order adopted by the honorable House of Representatives on the fifth day of July inst., requiring the opinion of the Attorney-General upon certain questions therein submitted, and to reply thereto as follows, to wit: —

First. — “Would the passage of the bill now printed as House Document No. 1456 insure the permanent right of the General Court to terminate the lease of the Boston & Albany Railroad to the New York Central & Hudson River Railroad Company, if any provision in said Document No. 1456 were violated?”

Second. — “If said House Document No. 1456 does not insure said rights to the General Court in all of its provisions, please name those portions of the proposed law whose violation would not cause a termination of the lease.”

Sixth. — “Can the lease of the Boston & Albany Railroad to the New York Central & Hudson River Railroad Company be now ratified under House Document No. 1456, without the sub-

sequent votes of the stockholders of the two railroad corporations hereinbefore mentioned accepting all of the provisions of said House Document No. 1456?"

Seventh. — "If it is not necessary to have the stockholders' votes of both railroad companies upon all of the provisions of House Bill No. 1456, please mention those provisions of the bill upon which such votes of acceptance upon the part of the stockholders of either railroad company would not be necessary."

The foregoing questions were fully considered and answered, so far as I am able to answer them, in an opinion which I had the honor to submit to the honorable House of Representatives on the second day of July inst., but, for the convenience of the House, I now restate the conclusions therein submitted.

A provision in the bill, stipulating that the consent of the Commonwealth should not take effect until the conditions imposed by the Commonwealth be accepted by the lessee by a corporate vote, insures the performance of the conditions by the lessee, and reserves the right of revocation by the Commonwealth upon the failure of such performance in the most effectual way in which such result can be attained.

The bill as it stands declares that such acceptance by the lessee is to be deemed to have been made by entry upon the demised premises and enjoyment of the franchise assigned to it. Such an acceptance, in my opinion, is binding upon the lessee. But I am not prepared to say that the rights of the Commonwealth are insured thereby so effectually as by a corporate vote. No counsel can assure his client that the court of last resort will determine questions of law in accordance with his opinions. His duty is discharged when he points out the various methods in which the desired result can be attained, with the contingencies that arise as to each method, leaving it to the client to determine which method shall be employed.

These observations apply alike to all the provisions of House Bill No. 1456, excepting that, as I have already had occasion to inform the honorable House of Representatives, I am of opinion that §§ 7 and 8, and probably § 5, are binding upon the parties to the lease, whether accepted by them or not. If they are not so

binding, they stand upon the same footing as the other provisions of the bill.

Third. — “Does the tenth provision of the lease printed as Senate Document No. 236, if once ratified by the General Court, permit the Boston & Albany Railroad Company and the New York Central & Hudson River Railroad Company to make further modifications and amendments to the lease without the necessity of further ratification of the General Court?”

Fourth. — “Are there any provisions of the lease, as printed in Senate Document No. 236, which would be equivalent to a consent on the part of the Commonwealth to future modifications of the lease without further legislation, or to the release of the Boston & Albany Railroad Company from any of the restrictions of Massachusetts laws to which the railroad is now subject?”

The foregoing questions are fully considered and answered in the opinion submitted to the honorable House of Representatives, March 16, 1900. In that communication I stated it as my opinion, to which I still adhere, that the lease cannot be cancelled, amended or modified by the parties without the further consent of the Commonwealth. The same observations, however, which I have already made hereinbefore as to the first and second questions, apply with equal force to these questions. All doubt upon the subject can be removed by a provision in the bill prohibiting such cancellation, modification or amendment, which provision is made a condition upon which the consent of the Commonwealth is granted, with the further provision that such condition be accepted by a vote of the corporation.

Fifth. — “Do the words ‘so far as the operation of said railroad is concerned,’ in § 5 of House Document No. 1456, limit the application of that section to the operating department of the Boston & Albany Railroad, so that the section may not apply to the financial affairs of the lessor?”

None of the provisions of the lease or of the proposed bill affect in any way the financial affairs of the lessor. They remain subject to the general provisions of law applicable to domestic railroad corporations, and to whatever special provisions, if any, are in force applicable to the lessor.

I cannot believe, however, that it was the intention of the honorable House of Representatives to submit any questions with regard to the financial affairs of the lessor, and I feel sure that the intention was to inquire as to the effect of the bill upon the financial affairs of the lessee.

Assuming such to be the question intended, I beg to answer as follows: The expression "financial affairs of the lessee," as used in connection with legislation, I understand to mean the issuance of stock and bonds and the payment of dividends upon the stock of the corporation. As to these matters, the lessee, being a foreign corporation, is subject to the paramount authority of the State granting its charter. Its financial affairs cannot be made subject to direct regulation by this Commonwealth. If statutes were enacted in relation to such matters by Massachusetts contrary to the provisions of the statutes of New York, it would still be the duty of the lessee to obey the laws of the latter State.

COUNTY ACCOUNTS — POLICE OFFICERS AND CONSTABLES — FEES
— DISTRICT.

A district is a distinct geographical division, established by the sovereignty for the purpose of taxation, and therefore the receipt of a salary from such district does not, under St. 1890, c. 440, preclude an officer who in the service of a warrant acts, not as a district, but as a town officer from charging his fees therefor.

Your letter of March 22 submits the question whether public officers or constables appointed by the town of Easton, without salary, who, as such constables or police officers, serve criminal process, are entitled to fees for such service, notwithstanding the fact that they are paid a salary by the North Easton Improvement District.

To the
Controller
of County
Accounts.
1900
July 18.

The question arises under the provisions of St. 1890, c. 440, § 1, which is as follows: "Except as specially provided in this act, no officer in attendance on any court, and no sheriff, deputy sheriff, jailer, constable, city marshal, or other police officer who receives a salary or an allowance by the day or hour from the Commonwealth, or from any county, city or town for his official services,

shall be paid any fee or extra compensation whatever for any official services rendered or performed by him in any criminal case in which the Commonwealth or any county, city or town is a party interested. . . ." It is well understood that under this act constables and police officers receiving a salary from the city or town by which they are employed cannot charge fees for service of criminal process.

There can be no doubt that the intention of the Legislature was to include all salaried officers; but I think this is a case where the letter of the law must govern, rather than the presumed intent of the Legislature. The North Easton Improvement District is not a town, but only a small portion of one. The word "district," when used in the legislation of the Commonwealth, has a special and well-understood signification. It includes, among others, fire districts, school districts and watch districts. Its revenue is provided for by taxation of its inhabitants. It is a distinct geographical division, established by the sovereignty for the purpose of taxation, — as much so as a county, a city or a town. These facts must have been in the mind of the Legislature when the act in question was framed. That being so, I am unable to read the word "district" into the act whose terms are so clear, or to construe "town" to include "district."

Whether the omission was by accident or by design, I am of opinion that the receipt of a salary from a district does not preclude an officer who, in the service of a warrant, acts not as a district but as a town officer, from charging his fees therefor.

COUNTY ACCOUNTS — FEES AND EXPENSES BEFORE TRIAL JUSTICES — CONSTRUCTIVE REPEAL.

Since it was the intention of the Legislature, in St. 1891, c. 325, to make proceedings before trial justices in all respects like those before the inferior courts of record, a provision in St. 1890, c. 440, which is at variance with such intention, is constructively repealed.

St. 1890, c. 440, entitled "An Act relating to fees of salaried officers, to expenses of criminal cases, of inquests and of commitment of the insane," changed radically the system before then in

force relating to expenses of criminal cases and the disposition of fines and costs. Formerly, in police, district or municipal courts the fees and expenses of officers were paid by the county, and all fines, forfeitures and costs recovered in such courts were paid into the county treasury. The statute in question changed this by providing that such fees and expenses shall be paid by the city or town in which the offence is committed, and that the fines and forfeitures recovered shall be paid to the same city or town; thus imposing upon cities and towns the expenses of prosecutions for petty offences, and giving to them the revenue by way of fines and forfeitures recovered from such prosecutions. The act contains no reference to trial justices, except in § 2, the last clause of which provides that in cases before trial justices the fees and expenses of officers, if not paid by defendants, shall be paid by the county where the trial is had.

St. 1891, c. 325, § 1, is as follows: "The provisions of chapter four hundred and forty of the acts of the year eighteen hundred and ninety, which relate to police, district and municipal courts, shall apply, with equal force and effect to trial justices and proceedings before them."

The question submitted by your letter of March 22 is whether the section last quoted is intended to repeal the last clause of § 2 of c. 440, so that, in cases before trial justices, officers' fees, instead of being paid by the county, as provided in the former act, shall be paid by the city or town where the offence was committed, as in cases before police, district and municipal courts.

Upon the general principles of construction applicable to such cases, it might fairly be contended that the special provision with relation to trial justices in the former act was intended to be left unchanged by the later act. The expression "the provisions . . . [in the former act] which relate to police, district and municipal courts," in the statute of 1891, would not ordinarily include a special provision in the former act not relating to police, district and municipal courts, but to trial justices, unless, from other provisions of the act, the intention of the Legislature appears to be inconsistent with such a construction.

Upon consideration, however, of the whole act, I am of opinion that the intention of the Legislature was that all its provisions,

including those relating to the payment of officers' fees, were intended to be applicable to trial justices; and that these tribunals were to be put upon the same footing in all respects with police, municipal and district courts. For example: by § 5, fines and forfeitures recovered in police, district and municipal courts are payable to the town or city in which the offence was committed. This provision is clearly made applicable to trial justices by the later act. It is not to be presumed that the Legislature intended that such towns and cities should have the financial benefits of such prosecutions, and at the same time not be liable for the expenses incurred. Section 8 provides that the disbursing officers in district courts shall pay the fees and expenses at the end of the trial, if they have in their hands sufficient funds payable to the city or town liable therefor; if they do not have such funds, the fees are to be certified to the treasurer of the city or town liable, who shall pay them. This section cannot apply to proceedings before trial justices if the clause in question in the former act is not repealed by the later act.

I do not think that such inconsistencies were intended, but that the purpose of the Legislature was to make proceedings before trial justices in all respects like proceedings before the inferior courts of record; and that the provision in the act of 1890, that, in cases before trial justices, the fees and expenses of officers are to be paid by the county, is constructively repealed by the act of 1891.

INSURANCE — FRATERNAL BENEFICIARY CORPORATIONS — FORM OF CONTRACT — BENEFIT CERTIFICATE — RESERVE FUND.

St. 1899, c. 442, relating to fraternal beneficiary corporations, regulates the form of the contract between the company and the certificate holder, by providing that such contract shall specify that the latter shall only receive the amount collectible by an assessment upon the members, regardless of the amount named in the certificate, except that when the corporation has, at the time when the certificate is payable, a reserve fund upon which it has the right to draw, the whole amount may be paid.

To the Insurance Commission.
1900
July 19.

St. 1899, c. 442, relating to fraternal beneficiary corporations, provides in § 11 as follows: "The benefit certificate shall, in effect, provide that if the death of the member therein named

shall occur when one full assessment on each member would not amount to the face sum of the maximum certificate of such corporation, then the amount paid the beneficiary thereunder shall not exceed the amount of such full assessment or the proportionate part thereof which said face sum named in such certificate bears to such maximum certificate, but this restriction shall not apply to a corporation which confines its membership to the permanent employees of towns, cities, the Commonwealth, or the federal government, nor to a corporation having an emergency or reserve fund until such fund shall have been exhausted."

Your letter of May 9 submits the question whether a corporation which has a reserve fund need insert the proviso in question in its benefit certificates, so long as any portion of such reserve fund remains in the possession of the corporation.

Taken literally, the language quoted does not require the insertion of the proviso until the reserve fund has been exhausted. But such a construction is manifestly absurd. The fund is exhausted not by the issuance of certificates, but by payments under them; and it is impossible to determine in advance whether the reserve fund will be sufficient to make good the amount insured when the certificate shall become payable. If, therefore, the section be construed according to its literal terms, it has no useful meaning and serves no purpose.

Although the language of the section is not in all respects happily chosen, the intention of the Legislature undoubtedly was to regulate the form of the contract between the company and the certificate holder, by providing that it shall specify that the latter shall only receive the amount collectible from an assessment upon the members, regardless of the amount named in the certificate, excepting that if, when the certificate is payable, the association has a reserve fund upon which it has the right to draw to make up the deficiency, the whole amount may be paid. If the contract be so worded, the beneficiary is not misled and the purpose of the statute is carried out.

I am of opinion, therefore, that such is the construction to be given to the statute, and that certificates are to be worded accordingly.

FRATERNAL BENEFICIARY ASSOCIATION — FOREIGN ASSESSMENT
INSURANCE COMPANY — EMPLOYMENT OF PAID AGENTS.

The features of fraternal beneficiary associations which distinguish them from assessment insurance companies are the non-employment of paid agents and the conduct of business upon the lodge system. Any insurance company, therefore, which elsewhere than in this State employs paid agents to solicit business, is not a fraternal beneficiary association within the meaning of the term as used in the statutes of Massachusetts, even though such agents are not employed in Massachusetts, but is, in effect, an assessment insurance company, and, as such, is not entitled to do business within this Commonwealth.

To the Insur-
ance Commis-
sioner.
1900
July 20.

Your letter of May 9 submits the question whether a foreign assessment insurance company, which in other States employs paid agents in soliciting business, may do business in this State under the provisions of St. 1899, c. 442, if it does not employ such paid agents in this Commonwealth.

The Legislature of this State has recognized three general classes of life and disability insurance, to wit: first, what may, for convenience, be termed "old line" insurance; second, assessment insurance conducted as a business enterprise; and third, fraternal benefit insurance, being that form of insurance which is provided by membership in fraternal and benevolent associations.

In the General Statutes, enacted in 1860, there is no reference whatever to any other than "old line" insurance. The first appearance in legislation of assessment insurance in any form was in St. 1877, c. 204, which provided that associations incorporated for educational, benevolent and religious purposes might, "for the purpose of assisting the widows, orphans or other descendants of deceased members, provide in their by-laws for the payment by each member of a fixed sum, to be held by such association until the death of a member occurs, then to be forthwith paid to the person or persons entitled thereto." It was further provided that the provisions of general insurance laws should not be applicable to such beneficiary insurance corporations.

Although the clear intent of this statute was to authorize only the payment of death benefits to the representatives of deceased members of benevolent and fraternal associations, an extensive

assessment insurance business grew up, the companies transacting which, while claiming to be authorized by this statute, were in fact doing business illegally. 1 Op. Atty.-Gen. 468. They were using a statute intended for charitable purposes to carry on an assessment insurance business. See *Bliss v. Parks*, 175 Mass. 539.

The attention of the Legislature was called to these practices, but, instead of prohibiting them, they were legalized by St. 1885, c. 183, which was the first of a long series of statutes authorizing the formation of corporations for the carrying on of assessment insurance. The statute of 1885, which regulated the assessment insurance business, expressly exempted fraternal benefit companies from its provisions, and they remained without special legislative regulation until St. 1888, c. 429, which was entitled "An Act relating to fraternal beneficiary organizations." With the enactment of that statute all three classes of insurance were recognized, and were regulated by statutes relating to each class.

It is not always easy to draw the line between a charitable association and an ordinary assessment insurance company. Both provide for the payment of benefits to the representatives of deceased certificate holders, the funds for which are derived from assessments upon other certificate holders. In this respect both are equally engaged in the business of assessment insurance.

The Legislature, however, in 1899 (c. 229, §§ 5, 6) prohibited the further carrying on of the business of assessment insurance, and repealed all legislation authorizing such business. Fraternal insurance associations were not included in this prohibition. It becomes necessary, therefore, to ascertain the legislative distinction between the two forms of insurance. In the first statute relating to fraternal beneficiary associations (St. 1888, c. 429), after regulating the formation of such corporations, it was provided in § 8 as follows: "Any corporation duly organized as aforesaid, and which does not employ paid agents in soliciting or procuring business, other than in the preliminary organization of local branches, and which conducts its business as a fraternal society on the lodge system, or limits its certificate holders to a particular order, class or fraternity, or to the employees of a par-

ticular town or city, designated firm, business house or corporation, may provide in its by-laws," etc. These words, in my opinion, define fraternal beneficiary associations as distinguished from assessment insurance companies. The same language is used in St. 1894, c. 367, which was a revision of existing statutes relating to beneficiary associations. In subsequent revisions (St. 1898, c. 474; St. 1899, c. 442) the provision with relation to the employment of paid agents is omitted from the section, a part of which I have quoted above, but is re-enacted in a separate section.

From these provisions it sufficiently appears that in all the legislation relating to fraternal beneficiary associations the Legislature has made the non-employment of paid agents and the conduct of business on the lodge system the distinctive features of such associations, as distinguished from assessment companies. It has thus carefully drawn the line between enterprises in their nature charitable and those which are entered into merely for the purposes of gain, and has declared that one of the distinguishing characteristics of an association purely benevolent is the fact that it does not employ paid agents to solicit business.

I am of opinion, therefore, that any insurance company which elsewhere than in this State employs paid agents to solicit business is not a fraternal beneficiary association within the meaning of that term as used in our statute, even though it does not employ paid agents in this State; but is, rather, in effect an assessment assurance company, and, as such, cannot do business within this Commonwealth.

The provision in the later statute relating to fraternal beneficiary associations (St. 1899, c. 442, § 21), that "no corporation organized or transacting business under this act shall employ paid agents in soliciting or procuring business," is not a mere local regulation. If it were, it would be in force only in this Commonwealth, and would not apply to foreign corporations. But, in view of the history of fraternal beneficiary associations and of their distinctive character as defined in the legislation of the Commonwealth, the prohibition of § 21, above quoted, is more than a mere local regulation. It is declaratory of the character

of the association, and as such applies equally well to foreign and domestic companies.

The result of holding otherwise would be that, while no domestic company can carry on assessment insurance business in this Commonwealth, any such company from abroad can come within the Commonwealth, and, by omitting to employ paid agents here, enjoy all the advantages of assessment insurance business denied to local companies.

I cannot believe the Legislature so intended. On the other hand, I am of opinion that it is your duty, when you are satisfied that an assessment insurance company is conducting business through paid agents, to deny it admission to this Commonwealth. It is not a fraternal beneficiary association within the meaning of that term as used in the legislation of this State.

FLATS — ERECTION OF STRUCTURES — SOLID FILLING — DIS- PLACEMENT OF TIDE WATER.

A decree of court requiring the erection of certain structures in tide water, by the city of Boston, and directing that "the first approach . . . shall be filled solid with suitable filling," does not require the city to make a structure impervious to water.

The word "solid," when used with reference to a structure to be erected in tide waters, is, unless words are used which clearly require such structure to be water-tight, to be taken to mean a structure built up solidly from the bottom, in contradistinction to one supported on piles.

The compensation to be paid, under Pub. Sts., c. 19, § 14, by the party erecting in tide waters a structure impervious to water, which lessens the amount of flow not only upon the flats covered by it, but also over adjacent flats, should be ascertained upon the basis of all the tide water which such structure displaces.

Your letter of June 6 submits the question whether, upon the facts stated in the documents accompanying the letter, the Boston Electric Light Company should be required to make compensation for tide water displaced by the filling of flats under a license from your Board. The facts, as far as they are material to the questions raised, appear to be substantially as follows: —

By a decree of the Superior Court, duly entered upon a petition for the abolition of certain grade crossings on Congress Street, the city of Boston was directed, among other things, to build

To the Board
of Harbor and
Land Commis-
sioners.
1900
July 21.

upon certain flats, a part of which at that time belonged to the Boston Electric Light Company, a way, being a part of what is now Dorchester Avenue extension. The terms of that part of the decree relating to this way were as follows: "Tenth. The first approach leading from Atlantic Avenue to said new street shall be filled solid with suitable filling, supported where necessary, by a sea-wall, and shall have a roadway paved and curbed with granite 60 feet wide, with a sidewalk on each side 10 feet wide, paved with brick."

As this work was required to be built over tide waters, the city of Boston applied to your Board for a license therefor. Their petition was filed in May, 1897, and was for a license to build "a sea-wall on the pier-head line, between Summer Street and Congress Street, and along the line of widening of Congress Street, and to fill back of said wall." In September, 1897, your Board issued a license authorizing the city of Boston "to build a sea-wall on the pier-head line between the northerly side line of Summer Street extension and the northerly side line of Congress Street as widened to 80 feet, and on said northerly side line of Congress Street as widened, from said pier-head line to the sea-wall of the Boston Real Estate Trust; also to fill solid back of said sea-wall, in conformity with the accompanying plan No. 2043." In conformity to these decrees the city of Boston has built, or is building, a solid structure. It has, however, constructed viaducts in said structure, through which the tide ebbs and flows upon the flats in the rear thereof. These flats belong to the Boston Electric Light Company.

The precise question submitted by your letter is whether the displacement of tide water which will be occasioned when the flats of the Boston Electric Light Company are filled should be paid for by the city of Boston or by the Boston Electric Light Company. The contention of the latter company is that, inasmuch as both the decree of the Superior Court and the license of your Board specify a sea-wall and a solid filling for the structure to be erected by the city of Boston, the land in the rear must necessarily be thereby cut off from the ebb and flow of the tide, so that there would be no longer any displacement of tide water

caused by the filling of the flats of the company; and that the city of Boston should pay for all the tide water which would be displaced by the structure built by it as a solid structure, impervious to the flow of the tide.

There can, of course, be no question that, if such a structure were built under license from your Board which would cut off all the land in the rear from the ebb and flow of the tide, the displacement to be paid for by the party erecting such a structure would include not merely the territory covered by the structure, but all the flats in the rear so separated from the ebb and flow of the tide. The language of the statute (Pub. Sts., c. 19, § 14) is as follows: "The amount of tide water displaced in tide water below high-water mark, or by any filling of flats," etc. The section further provides that the annual income from all fees for compensation for tide water displaced shall be expended by your Board for the improvement of the harbor. The purpose of the section was clearly to require persons lessening the volume of tidal flow over flats adjacent to a harbor to contribute in proportion to the amount of such lessening to a fund for the improvement of the harbor. A solid structure, impervious to water, would lessen the amount of flow, not only upon the portion of the flats covered by the structure, but upon all the flats from which the water was thereby kept; and the compensation to be paid by the party building such a structure should be ascertained in view of all such displacement.

The difficulty with the contention of the Boston Electric Light Company is, that it interprets the words "filled solid," which occur several times in the decree, and are used in the license of your Board, to mean a filling which is effectual to shut off the flow of water. Unless the word "solid" necessarily imports such a meaning, this interpretation is not warranted by the language of any part of the decree or of the license. On the contrary, referring to another part of the work, the decree requires the building of a wall of stone laid in cement, which obviously would be a water-tight structure. It does not follow that a sea-wall, or even a solid structure, is impervious to the ebb and flow of the tide. On the contrary, it is a matter of common knowledge that

in the case of loosely built stone walls the water flows through almost as readily as through a pile structure.

The language used both by the court and by your Board, in my opinion, has reference, not to the question of imperviousness to water, but rather to the character of the structure for the purposes for which it is to be used. Two kinds of structures are in common use in tide waters: one is a solid filling, the other a structure supported by piles. When the term "solid" is used with reference to a structure to be constructed in tide waters, it is, unless words are used which clearly require a water-tight structure, to be taken to mean a structure built up solid from the bottom, in contradistinction to a pile structure.

There was nothing either in the decree of the court or in the license of your Board which required the city of Boston to make its structure impervious to water; and unless, for reasons which have no reference to the case of the Boston Electric Light Company, your Board saw fit to direct otherwise, it might properly provide for the passage of tide water through the sea-wall and filled roadway without disobeying the essential terms of the decree or of your license.

But, however this may be, the situation as to the Boston Electric Light Company, so far as it concerns its obligations under the law, is very simple. It is in possession of flats over which the tide water ebbs and flows. It seeks permission to fill those flats and thereby to displace a corresponding amount of tide water which actually flows upon its premises. It is not a party to any questions which may arise between your Board and the city of Boston, or between the court and the city, and cannot set up the city's acts to support its claim that it should not pay for the displacement which its filling actually causes.

For these reasons, I am of the opinion that your Board may properly determine that the Boston Electric Light Company should pay for the amount of tide water actually displaced by it by filling its flats.

FOREIGN CORPORATIONS — EXPRESS COMPANIES — APPOINTMENT OF AGENT FOR SERVICE — UNINCORPORATED ASSOCIATIONS.

So much of Pub. Sts., c. 73, § 3, which provides that every corporation not organized in, or every association of persons not inhabitants of, this Commonwealth, which does an express business, shall appoint an agent resident in Massachusetts, upon whom processes against such corporation or association may be served, as relates to incorporated express companies is superseded by St. 1884, c. 330; the provisions regarding voluntary associations composed of inhabitants of other States are, however, still in force.

Your letter of July 16 requires the opinion of the Attorney-General upon the question whether Pub. Sts., c. 73, § 3, has been superseded by St. 1884, c. 330.

To the
Treasurer and
Receiver-
General.
1900
August 14.

The chapter of the Public Statutes referred to relates to common carriers and express companies. Sections 1 and 2 are intended to prohibit discriminations in the charges for express business. Section 3 is, in part, as follows: "Every corporation not organized in this Commonwealth and every association of persons not inhabitants thereof, which does an express business in the Commonwealth, shall, in writing, appoint a person who is a citizen thereof and a resident therein, to be a general agent, upon whom all lawful processes against such corporation or persons may be served with like effect as if served on said corporation or persons; and said writing, or power of attorney, shall contain an agreement on the part of the corporation or persons making the same that the service of any lawful process against it or them on said general agent shall be of the same legal force and validity as such service on said corporation or persons, or any of them." The section further provides that the power of attorney shall be filed in the office of the Secretary of the Commonwealth, and that the agency thus created shall continue as long as such express business is done in this Commonwealth.

Section 4 provides that the agent so appointed shall give a bond to the Treasurer of the Commonwealth, with the condition that he will accept service of all lawful processes against his principal. Section 5 imposes a penalty upon every person doing business as an agent of a foreign express company or association unless

the provisions above referred to have been complied with. Section 6 relates to other matters.

At the time this statute was enacted, the only provision relating to service of process upon corporations generally was in Pub. Sts., c. 105, § 28, which provided that corporations created by any other State having property in this Commonwealth should be liable to be sued in like manner as residents of other States having property in the Commonwealth are liable to be sued. In addition to this general provision, there was a special provision relating to insurance corporations. Pub. Sts., c. 119, § 202.

The first general law requiring all foreign corporations to appoint a domestic agent was St. 1884, c. 330. Section 1 is as follows: "Every corporation established under the laws of any other state or foreign country and hereafter having a usual place of business in this Commonwealth shall, before doing business in this Commonwealth, appoint in writing the commissioner of corporations or his successor in office to be its true and lawful attorney upon whom all lawful processes in any action or proceeding against it may be served, and in such writing shall agree that any lawful process against it which is served on said attorney shall be of the same legal force and validity as if served on the company, and that the authority shall continue in force so long as any liability remains outstanding against the company in this Commonwealth. A copy of the writing, duly certified and authenticated, shall be filed in the office of the said commissioner, and copies certified by him shall be deemed sufficient evidence thereof. Service upon such attorney shall be deemed sufficient service upon the principal." It will be seen that this section is similar in its provisions to Pub. Sts., c. 73, § 3, above quoted, excepting that the agent to be appointed by the foreign corporation must be the Commissioner of Corporations, who, being a public officer, is not required to give bond as such agent.

Of course no useful purpose can be subserved by requiring foreign express corporations to comply with both statutes, although I am informed that this has been done since the statute of 1884 in a number of cases. Under the general rules of construction applicable to such cases, the later law, being general in its terms and covering the whole field, repeals the prior special

law. Under this rule, foreign corporations carrying on express business in this Commonwealth, so far as the appointment of agents is concerned, are now within the provisions of the statute of 1884, and are no longer required to appoint a private person as agent, under the provisions of Pub. Sts., c. 73, § 3.

Inasmuch, however, as c. 73 includes unincorporated associations not inhabitants of the Commonwealth, while the statute of 1884 refers only to the foreign corporations, the section of the Public Statutes cannot be regarded as wholly repealed by the statute of 1884; but, on the other hand, it is still in force so far as regards voluntary associations composed of inhabitants of other States.

It follows that, in so far as Pub. Sts., c. 73, § 3, relates to foreign express companies, it is superseded by the statute of 1884. Although this construction of the two statutes is somewhat awkward, it is the only possible one which, consistently, can be adopted. It is to be observed that insurance companies, which, like express companies, had heretofore been governed by special provisions, are expressly exempted from the general provisions of the statute of 1884. This strengthens the conclusion that express companies were intended to be included in the general law.

COMMISSIONERS ON INLAND FISHERIES — GREAT PONDS — PUBLIC RIGHT OF FISHING.

Since great ponds are the property of the Commonwealth, and fishing in them is free to the public excepting when otherwise provided by the Legislature, a statute which limits the right of citizens to fish in great ponds is derogative of the rights of citizens generally, and is to be strictly construed.

When a great pond has been stocked and the fishing therein regulated for a period "not exceeding three years," under St. 1897, c. 208, the Board of Commissioners of Inland Fisheries cannot, after the expiration of such term, again stock and regulate the fishing in such pond under the provisions of that statute.

Great ponds, meaning by that term ponds of more than twenty acres in area, are in this State the property of the Commonwealth, and fishing in them is free to the public excepting when otherwise provided by the Legislature. A statute, therefore, which limits the right of citizens to fish in great ponds is to be strictly construed, being derogatory to the rights of citizens generally.

To the Commissioners
on Inland
Fisheries
and Game.
1900
August 21.

By Pub. Sts., c. 91, § 12, the Commissioners of Inland Fisheries were authorized to lease a great pond for the purpose of cultivating useful fisheries, for such time as they might see fit. This section, however, was repealed in 1885. St. 1885, c. 109.

Section 17 of the same chapter (Pub. Sts., c. 91) authorized the commissioners to occupy, manage and control not exceeding six great ponds for the purpose of cultivating useful fisheries. This statute is still in force, and, taken in connection with the repeal of § 12, authorizing the leasing of great ponds, clearly indicates the intent of the Legislature to limit the number of ponds, public rights in which may be indefinitely restricted, to six in number.

St. 1897, c. 208, provides as follows:—

SECTION 1. The commissioners of inland fisheries and game, upon petition of thirty or more inhabitants of a city or town within whose limits a great pond or portion thereof is situated, or upon petition of the mayor and aldermen of such city or of the selectmen of such town, shall cause the waters of such pond to be stocked with such food fish, if any, as they may judge to be best suited to the waters in which the fish are to be placed.

SECTION 2. Said commissioners shall thereupon prescribe, for a period not exceeding three years, such reasonable regulations relative to the fishing in such pond or ponds and their tributaries, with such penalties, not exceeding twenty dollars for any one offence, as they may deem for the best interests of the public, and shall cause such regulations to be enforced.

The question submitted in your letter of July 28 is whether, when a great pond has been stocked and the fishing therein regulated for a period “not exceeding three years,” under the statute last quoted, your Board may, after the expiration of such term, again stock and regulate the fishing in said pond under the provisions of said statute.

Clearly not. If the law could be so construed, the power of the commission to diminish public rights in great ponds might be indefinitely extended, both as to time and as to number. Such a construction is not to be favored, and was evidently not intended by the Legislature.

SECRETARY OF THE COMMONWEALTH — CONVENTION — NOMINATION OF CANDIDATES — OFFICIAL BALLOT.

A convention cannot divest itself of its duty to nominate candidates by delegating that duty to any person or committee, unless the action of such delegated person or committee is ratified by the convention itself.

The Secretary of the Commonwealth cannot, therefore, place upon the official ballot the name of a candidate upon which the convention has not itself acted in some form.

Your inquiry of September 1 in substance is whether, in my opinion, a political convention may by a vote authorize its officers or a committee to nominate such candidates as it is authorized to nominate, instead of making delegate nominations. I assume that the purpose of the inquiry is to enable you to determine whether you have a right to place upon the Australian ballot the name of a candidate nominated in the way suggested.

To the
Secretary.
1900
September 1.

There are many complex and precise provisions as to the conduct of caucuses, but the Legislature has seen fit to leave political conventions unhampered by any specific rules. The only law applicable to them, therefore, is such as would be applicable to any deliberative assembly.

Delegates to conventions are selected and commissioned to nominate candidates. They are unhampered as to their method of nominating candidates. They can do so by acclamation, by vote, by the adoption of the recommendation of a committee, or by lot, even, if the result be adopted by the convention; but the nomination, when made, must be the work of the convention, and not of a body delegated by them. This is the general rule applicable to all delegated authority.

In my opinion, a convention cannot divest itself of its duty to nominate candidates by devolving that duty upon any other person or committee, unless the action of such delegated person or committee is ratified by the convention itself. I cannot advise you to receive the name of a candidate upon which the convention has not itself acted in some form.

UNPAID TAXES — RATE OF INTEREST — LEGISLATIVE INTENT — REPEAL.

St 1900, c. 398, repeals so much of Pub. Sts., c. 13, § 54, as fixes the rate of interest on unpaid taxes due the Commonwealth.

To the Com-
missioners on
Revision of
Statutes.
1900
October 16.

Whatever may have been the intent of the framers of St. 1900, c. 398, I am constrained to believe that the legislative intent deducible from this amendment must be taken to be the repeal of so much of Pub. Sts., c. 13, § 54, as fixes the rate of interest on unpaid taxes due the Commonwealth.

The older statute provides that, upon suit brought by the Treasurer, he may recover the taxes "with interest at the rate of twelve per cent. per annum until the same are paid." St. 1900 provides that all corporations neglecting to pay taxes shall pay "interest at the rate of six per cent. per annum on the amount so certified, from the time when such taxes become due until they are paid."

These are obviously inconsistent provisions as to rate, and perhaps as to the duration of time during which interest runs. I cannot believe that it was the intention of the Legislature to impose a different rate of interest where suits are brought from those paid without suit. There is no such provision, so far as I know, in any other department of the law; and there seems to be no good reason for supposing the Legislature so to have intended.

INSURANCE — NATURE OF CONTRACT.

An agreement by which a corporation, in consideration of a weekly payment, undertakes to furnish medical attendance to the person with whom the contract was made, and to have filled and furnished prescriptions for medicine that may be prescribed by the physician, it being stipulated that the corporation furnishes the physician, is not a contract of insurance.

To the Insur-
ance Commis-
sioner.
1900
October 17.

The opinion of the Attorney-General is required by you upon the question whether the form of agreement submitted to me of the American Medical Protective Society, a New Jersey corporation, will, if executed in this Commonwealth, amount to a contract of insurance.

The contract, a form of which is submitted, is in substance an agreement by which the corporation, in consideration of a weekly payment, undertakes to furnish medical attendance to the person with whom the contract was made, and to have filled and furnished prescriptions for medicine that may be prescribed by the physician, it being stipulated that the corporation furnishes the physician.

This is not a contract of insurance. 1 Op. Atty.-Gen. 545, 547.

PAUPER — SETTLEMENT — MILITARY SERVICE — UNITED STATES RECORDS.

Where a pauper is enrolled upon the records of the United States as having been honorably discharged from the military service thereof, that fact is conclusive evidence of such discharge upon a question of settlement.

Your letter of May 24, touching the question of the settlement of Frank Alonzo Sherman, who died at the Worcester Insane Hospital, was duly considered at the time, but, unfortunately, was mislaid.

To the Superintendent of
State Adult
Poor.
1900
October 19.

If I understand the facts, Sherman had probably been absent without leave from his post of duty, and had not returned to be mustered out; thereupon he was at first taken to have been a deserter.

Acting under the authority of c. 390 of the Acts of the second session of the fiftieth Congress (U. S. Rev. Sts. at Large, Vol. 25, p. 869), the charge of desertion was removed by the Secretary of War, and he was enrolled upon the records of the United States as being honorably discharged. Similar proceedings took place in this Commonwealth; but, in view of what I deem to be the law, I do not regard the Massachusetts proceedings as of consequence.

If I understand the purport of the decision of the court in *Fitchburg v. Lunenburg*, 102 Mass. 358, questions of fact as to discharge, desertion, absence from leave, etc., arising upon settlement cases between two municipalities, must be governed by the official records of the military authorities of the United States. This case appears to come within the purview of that decision;

and, if it can be shown that the man in question appears upon the records of the United States as having been honorably discharged, that fact is conclusive upon the question of settlement.

PAUPER — INSANE PERSON — TRANSFER TO STATE ALMSHOUSE
— NOTICE.

Where an insane person, who has been duly committed to and is a legal inmate of an insane hospital, is transferred by the State Board of Charity, by authority of St. 1888, c. 69, to the insane ward of the State Almshouse, notice of such transfer to the town liable for his support is not required.

Nor is the father of such person pauperized by his detention in the State Almshouse, his status being that of an insane person and not that of a pauper.

To the Super-
intendent of
Adult Poor.
1900
November 10.

Your letter of October 18 requires the opinion of the Attorney-General upon the question whether the town of Royalston is liable for the support of Simeon Quigley, an inmate of the insane ward of the State Almshouse at Tewksbury. Quigley has been an imbecile from childhood, and never acquired a settlement except through his father. The town of Royalston concedes that the father, by reason of residence and payment of taxes, became settled in that town, but disputes liability, for two reasons: —

1. That no notice was sent to the town, in accordance with the provisions of Pub. Sts., c. 86, § 35.

2. That, inasmuch as Quigley has become an inmate of the almshouse, the father is pauperized by his presence there, and does not benefit by the provisions of Pub. Sts., c. 83, § 3.

Pub. Sts., c. 86, § 35, provides as follows: "If a pauper having a legal settlement in any place becomes an inmate of the almshouse, such place shall be liable to the Commonwealth for the expense incurred for him, in like manner as one town is liable to another in like cases; and the trustees and the state board shall adopt the same measures in regard to notifying towns so liable, the removal of the pauper, and the recovery from towns of expenses incurred for him, as are prescribed for towns in like cases."

This section is intended to apply to the ordinary case of a sane person becoming, by reason of poverty, a pauper charge and admitted to the State Almshouse, and is intended to give season-

able notice to the town liable for his support, to the end that the town may take such measures for the support of the pauper as it deems proper, including his removal from the almshouse, if it so desires.

In my opinion, however, it has no application to the case of an insane person, who, having been duly committed to an insane hospital by proper proceedings therefor, and being a lawful inmate of such insane hospital, is transferred by the State Board of Charity to the insane ward of the almshouse. He does not thereby become the less a ward of the State, and notice would be of no benefit to the town, for it could take no measures for his removal or support outside the almshouse. The insane person is transferred to the insane ward of the almshouse, not as a pauper, but because the public interest requires such a transfer. St. 1888, c. 69. Notwithstanding such removal, he is still in the class of insane persons rather than that of paupers, and the laws applicable to insane persons still regulate his *status* in the insane ward of the almshouse.

The same considerations dispose of the second objection of the town. Pub. Sts., c. 83, § 3, relied upon by the town, provides that "No person who actually supports himself and his family shall be deemed to be a pauper by reason of the commitment of his wife, child, or other relative to a lunatic hospital or other institution of charity, reform, or correction by order of a court or magistrate, and of his inability to maintain such wife, child, or relative therein; but nothing herein contained shall be construed to release him from liability for such maintenance."

Quigley's son is still in a ward of an insane hospital, and is detained there as an insane person, not as a pauper.

CORPORATION — ELECTION OF OFFICERS — BY-LAWS —
ATTORNEY.

The election of the officers of a corporation is a corporate function, which cannot be delegated without express statutory authority.

The statutes do not contain such authority, but, on the contrary, by clear intendment require that such officers shall be elected by the members of the corporation; and a by-law which delegates to the board of directors of a co-operative bank the election or selection of the secretary, treasurer or other officers of the bank is therefore illegal.

An attorney is not an officer of the corporation, and cannot be made one by the by-laws.

To the Board
of Savings
Banks Com-
missioners.
1900
November 10.

Your letter of October 13 requires the opinion of the Attorney-General upon the question whether "it is legal for the shareholders of a co-operative bank to incorporate in its by-laws one that delegates to its board of directors the selection or election of a secretary, treasurer or other officer of the bank."

The election of officers is a corporate function, and one that cannot be delegated, except by express statutory authority. I find no such authority. On the contrary, the statutes by clear indication require that the officers of a corporation shall be elected by the members of the corporation.

Pub. Sts., c. 117, § 6, provides that "The number, title, duties, and compensation of the officers of the corporation, their terms of office, the time of their election, as well as the qualifications of electors, and the time of each periodical meeting of the officers and members, shall be determined by the by-laws; but no member shall be entitled to more than one vote at any election. All officers shall continue in office until their successors are duly elected, and no corporation shall expire from neglect on its part to elect officers at the time prescribed by the by-laws."

There is nothing in this section which can be construed to authorize the delegation by the corporation to its directors of the corporate duty of electing its officers. On the contrary, the last sentence appears to recognize that they are to be elected by the corporation, in providing that "no corporation shall expire from neglect on its part to elect officers."

Moreover, Pub. Sts., c. 105, § 1, extends the provisions of that chapter to all corporations organized under the laws of the Com-

monwealth, excepting so far as they are inconsistent with special provisions. Section 4 of that chapter provides that "every corporation, where no other provision is specially made, may . . . elect, in such manner as it may determine, all necessary officers." Section 5 contains further provisions relating to the manner of calling and conducting meetings of the corporation, the number of members that shall constitute a quorum, the number of shares that shall entitle members to votes, and other like provisions relating to corporate action. This section plainly contemplates that officers of a corporation shall be elected by the corporation itself.

Whether those who are called officers of the corporation are in fact such, or are merely agents, may be a more difficult question, but as to the so-called officers, referred to in your inquiry, there is no difficulty. The secretary and treasurer are expressly recognized by the statutes as corporate officers, for it is provided in St. 1885, c. 121, § 1, that these offices may be held by one and the same person. See also St. 1898, c. 247, § 1. The secretary and treasurer are, therefore, clearly officers of the corporation.

On the other hand, an attorney is not necessarily an officer of the corporation, and is not made such an officer by providing in the by-laws that he shall be.

In general, it may be said that the officers of a corporation are such officers as are necessary to the carrying on of its corporate existence. This definition does not include an attorney.

CITIZENSHIP — STUDENT.

A student at an institution of learning in this Commonwealth may, if he is of age, and free to choose, become a citizen of the town in which such institution is located.

Replying to your inquiry with reference to the right of a student in the Massachusetts Agricultural College to become a citizen of Massachusetts, I have to say as follows: —

To the
Governor.
1900
November 27.

Citizenship is a question of fact, to be determined upon all the circumstances, including, as an important factor, the intention of the person in question. Ordinarily, a student at an institution

of learning does not by mere attendance at such institution become a citizen of the town in which the institution is located; but if he is of age, and free to choose, there is nothing to prevent him from becoming such a citizen. The necessary steps are such as any person coming from another jurisdiction is required to take in order to acquire domicile in this State..

GREAT PONDS — PUBLIC RIGHTS — HARBOR AND LAND COMMISSIONERS — APPROVAL OF STRUCTURES.

A statute which gives to a town the exclusive and unlimited right to use the waters of a great pond as a source of water supply does not further diminish the rights of the public in such pond.

The public is, therefore, still interested in the pond, and, since the purpose of requiring the approval of the Board of Harbor and Land Commissioners for structures upon and changes in great ponds is the protection of public rights therein, it follows that the town must submit to the Board, for its approval, plans contemplating work of that nature.

To the Board
of Harbor and
Land Com-
missioners.
1900
November 27.

Your letter of August 3 states that the town of Lincoln desires to make certain changes in the arrangement of its pumping station on the shores of Sandy Pond in Lincoln, and to straighten and otherwise improve the shore line; and requires the opinion of the Attorney-General whether the approval of your Board is necessary therefor.

By St. 1888, c. 318, great ponds were put under the control of the Harbor and Land Commissioners; and it was provided in § 2 that "except as authorized by the general court and provided in this act, no structure shall hereafter be built or extended, or piles driven, or land filled, or other obstruction or encroachment made, in, over or upon the waters of any great pond."

Section 3 further provides as follows: "All persons that are or may be authorized by the general court to build or extend any structure or to do any other work aforesaid, and who have not begun the same, shall, before beginning it, give written notice and submit plans of the work they intend to do to the board of harbor and land commissioners; and the provisions of section eight of chapter nineteen of the Public Statutes shall apply to all such works and to the plans therefor, and to the approval thereof by said board."

The statute under which the town of Lincoln is authorized to erect structures upon and make changes in the shore of Sandy Pond was enacted in 1872, many years before the statute above quoted giving jurisdiction to your Board over great ponds; but it is to be observed that the provisions of § 3 of the great pond act, above quoted, include not only structures to be hereafter authorized by the General Court, but also those which had been authorized by some provision of the Legislature before the enactment of the statute. This is clearly within the power of the Legislature. The statute of 1872, in giving to the town the power to take land and water rights for a public use, did not give it an absolute right the exercise of which the Legislature could not afterwards supervise. Nor is the statute of 1872 a contract with the town. The statute of 1888, therefore, does not take any property right from the town or impair the obligation of a contract. The town of Lincoln must, therefore, submit its plans to your Board for approval, unless there is some provision of the statute which exempts it therefrom.

This act of 1872, c. 188, relating to Sandy Pond, provides, in § 2, as follows: "Said town, for the purposes aforesaid, may take and hold the waters of Sandy pond, so called, in the town of Lincoln, and the waters which flow into and from the same, and may also take and hold, by purchase or otherwise, all necessary lands for raising, flowing, holding, diverting, conducting, purifying and preserving such waters, . . . and may erect thereon proper dams, reservoirs, buildings, fixtures and other structures, and make excavations and embankments, and procure and run machinery therefor."

This section gives to the town the exclusive and unlimited right to use the waters of Sandy Pond for the purposes of a water supply, but it does not otherwise take away the rights of the public in the pond. It still remains a public pond, open to the public for all purposes for which it may lawfully use the great ponds of the Commonwealth, subject only to the right of the town to draw off the water for the purposes of a water supply. *Rockport v. Webster*, 174 Mass. 385.

The public, therefore, is still interested in the pond; and the purpose of requiring the approval of your Board for structures

upon and changes in great ponds is the protection of the public rights in such ponds. The case does not differ from that presented by the statute authorizing the construction of the terminal station over tide water, in which I advised your Board that all plans therefor must be approved by the Board. 1 Op. Atty.-Gen. 480.

I am of opinion, therefore, that the approval of the Board is necessary for the work proposed by the town of Lincoln.

TOWNS — STREETS — COMMONWEALTH'S LAND.

A town has no authority to lay out a street over land held in fee by the Commonwealth, without the consent of the Legislature.

To the
Governor.
1900
November 27.

It is not entirely certain whether a town may take land held by the Commonwealth in fee, for the purpose of constructing or widening a street. My opinion is strongly against it.

I do not forget that Pub. Sts., c. 54, § 15, contains an express prohibition against the taking by a town of land of a public institution belonging to the Commonwealth. It might be inferred from this prohibition that the Legislature at least were of opinion that, but for such a prohibition, such land could be taken. It is well known, however, that statutes are frequently declaratory of the common law, and may be so construed, instead of being regarded as exceptions thereto.

St. 1900, c. 382, relating to the State House park, provides that the Governor and Council may "waive any or all grade damages or claims for land taken for improvement of streets." This, too, would appear to recognize the right of the city to widen a street by taking land of the park, by authorizing the Governor and Council to waive land damages therefor.

But, notwithstanding this indirect authorization, I am still of the opinion that a street may not be laid out over land owned by the Commonwealth and used by it for public purposes, without the consent of the Legislature. If this be so, and it is desired to widen Bowdoin Street, I think, in order to remove all doubt, the Legislature should be asked to pass a resolve authorizing such action by the city of Boston.

STATE HIGHWAY COMMISSION — ALTERATION OF LOCATION OF
TRACKS OF STREET RAILWAY IN HIGHWAY — CHANGES IN
GRADE — APPORTIONMENT OF EXPENSE.

The State Highway Commission, in altering the location of the tracks of a street railway located on a State highway, under St. 1898, c. 578, § 16, has authority to order changes in grade as well as in horizontal position.

The commission may also assess upon the railway such portion of the expense of the relocation as it deems proper.

Your letter of October 12 requires the opinion of the Attorney-General upon the question whether the Massachusetts Highway Commission has the right "to order changes in grade as well as in the horizontal position of the tracks of a street railway company on the State highway under § 16 of c. 578, Acts of 1898;" and also if it has the right to insert in its decrees a provision that the railway companies shall pay the damages occasioned to abutting property by the relocation of its tracks.

To the Massachusetts Highway Commission.
1900
November 27.

St. 1898, c. 578, § 24, provides that the Massachusetts Highway Commission shall in certain cases have the same jurisdiction with regard to the location and maintenance of street railways as is conferred upon municipal officers with regard to ordinary town ways.

The authority of town and city officers is contained in § 16 in the same act, which is as follows: "The board of aldermen of a city or the selectmen of a town, upon the petition of the board of directors of a street railway company . . . or upon the petition of any interested party, . . . may alter the location of tracks of said company in the manner and subject to the provisions contained in section fifteen of this act. Such alterations shall be made by the company within such time, and the expense thereof shall be borne by such party or parties, and in such proportions, as the board of aldermen or selectmen may determine."

The word "location," as used in the section above quoted, doubtless includes grade as well as position. If the authorities had no control over the grade, the consequences might be disastrous.

The statute quoted expressly provides that "the expense thereof shall be borne by such party or parties, and in such pro-

portions, as the board of aldermen or selectmen may determine." This clearly gives your Board the right to apportion such part of the expense as it deems proper upon the railway company whenever it orders a change in location.

HARBOR AND LAND COMMISSIONERS — ASSIGNMENT OF LEASE — COVENANTS.

When a lease is assigned and the assignee enters under it, he becomes tenant of the lessor and is bound by all the covenants of the lease which are not personal to the lessee.

When, therefore, a lessee of the Harbor and Land Commissioners assigns his lease, an agreement to perform the covenants of the lease by the assignee is unnecessary.

To the Board
of Harbor and
Land Commis-
sioners.
1900
November 27.

Your letter of November 26 states that a lessee from your Board of certain lands in the city of Boston desires to assign his lease to a third person; that your Board is ready to approve the assignment, but desires to know whether "it would not be wise to have an acceptance of the assignment and an agreement to perform the covenants of the lease over the signature of the assignee."

No such agreement by the assignee is necessary. When a lease is assigned and the assignee enters under it, he becomes tenant of the lessor. He is bound by all the covenants of the lease which are not personal to the lessee. *Wells, J.*, in *Sanders v. Partridge*, 108 Mass. 556; *Brewer v. Dyer*, 7 Cush. 337.

BOUNTY — ENLISTMENT TO SATISFY SPECIFIC ORDER OF COM- MANDER-IN-CHIEF.

A vote of a city council, promising a bounty "to such persons, residents of the city, as may hereafter enlist as volunteers, . . . in accordance with the order of the Commander-in-Chief," includes such persons only as enlisted in accordance with a specific order of the Commander-in-Chief.

To the
Secretary.
1900
November 30.

Your letter of May 14, written in behalf of the commission appointed to act upon claims for unpaid bounties, requires the opinion of this office upon the question whether William H.

Carney, formerly of Company C, Fifty-fourth Massachusetts Volunteers, a claimant for unpaid bounty said to have been promised by the city of New Bedford, is entitled to have his claim certified by your commission.

The applicant enlisted in New Bedford, Feb. 17, 1863, being at that time a citizen of that city. He claims a bounty under the provisions of a vote of the city council of New Bedford, passed August 18, 1862, which was as follows:—

Ordered, That the sum of one hundred and fifty dollars be and the same is hereby appropriated (in addition to the bounty heretofore appropriated by the city council), to be paid such persons, residents of New Bedford, as may hereafter enlist as volunteers to be mustered into the service of the United States for the term of three years, or until the close of the war, in accordance with the order of the Commander-in-Chief.

The precise question presented is, whether the order above quoted includes all persons who enlisted subsequent to that date, or only such as enlisted and were mustered in in accordance with some specific "order of the Commander-in-Chief." I have given the matter some attention, both for the reason that the case of the claimant is a strong one in equity, and also for the reason that, as I am informed, a number of other claims rest upon the same facts, and must be governed by your decision in this case.

I regret to be obliged to say that in my opinion this claimant does not bring himself within the terms of the statute under which your commission acts. That statute provides (St. 1898, c. 525, § 1) for the allowance of claims made by veterans who were "promised a bounty for military or naval service by vote of any city or town in this Commonwealth prior to the ninth day of April, in the year eighteen hundred and sixty-five." The records are somewhat confused as to details, but they establish clearly the fact that the whole quota of New Bedford called for by the Commander-in-Chief was filled on or before November 24, 1862, at which time the city had paid bounties in accordance with its votes to 1,041 men, that being the amount of the quota fixed by the Commander-in-Chief by his order dated October 1, 1862.

The particular vote of August 18 above quoted, upon which this claimant relies, appears to have been passed in consequence of a special order of the Commander-in-Chief, dated August 16, authorizing the mayor to raise a three-years company on or before Thursday, August 21. This call was complied with, and the number of men so required were duly enlisted before the date named, and received the bounty promised. This enlistment and payment of bounty seems to have exhausted the obligations of the city under that order.

But, whether this was so or not, the fact remains that at the time of the enlistment of this claimant, in February, 1863, there was no unfilled call from the Commander-in-Chief. Inasmuch as the order above quoted, and all the orders to which my attention has been called, are limited in terms to such volunteers as were enlisted in accordance with "the order of the Commander-in-Chief," I am constrained to find that no bounty was promised him by any vote of the city of New Bedford for his enlistment.

As I have already stated, however, the claim seems to be a meritorious one, which you may properly recommend to the General Court for recognition by special legislation.

EDUCATIONAL INSTITUTION — PETITION FOR AUTHORITY TO GRANT DEGREES — SECRETARY OF STATE BOARD OF EDUCATION.

The secretary of the State Board of Education is not, under St. 1896, c. 381, required to take any action upon a petition to the Legislature for authority to grant degrees in engineering, presented by a corporation chartered under the laws of the State of Maine.

To the State
Board of
Education.
1900
December 5.

Your letter of November 13 requires the opinion of the Attorney-General as to whether the secretary of the State Board of Education is required to take any action upon the petition of the Boston Engineering School to the Legislature of Massachusetts.

St. 1896, c. 381, provides that whoever intends to present to the General Court a petition for the incorporation of an educational institution with power to grant degrees, or for an amend-

ment to the charter of an existing educational institution so that it may have power to grant degrees, shall give notice of such petition by publication in such newspapers as the secretary of the State Board of Education may direct.

The petition is for authority to grant degrees in engineering. The school in question is chartered by the State of Maine, and has no charter in Massachusetts. The petition, therefore, is not for incorporation, nor is it a petition for an amendment to a charter, for that part of the statute providing for amendments of a charter obviously refers only to corporations incorporated within this Commonwealth.

It follows that no action is required by you under the statutes.

TOWN — USE OF GREAT POND AS SOURCE OF WATER SUPPLY — PUBLIC RIGHTS — FISHING.

A statute authorizing a town to take and hold the waters of a great pond for the purposes of a water supply does not take away any public rights therein, except so far as they are necessarily lost in the exercise of the right conferred upon the town to use the waters of the pond as a source of water supply. It follows that the town has no right to obstruct the passage of fish to and from such pond, unless its waters are thereby rendered unsuitable for drinking purposes.

Your letter of July 28 states that a conflict of jurisdiction has arisen between the water commissioners of Rockport and your Board as to the right of your Board to maintain fishways for the entrance of alewives into Cape Pond.

To the Commissioners
on Inland
Fisheries
and Game.
1900
December 6.

St. 1894, c. 78, authorized the town of Rockport to take and hold the waters of Cape Pond, so called, and the water rights and water sources connected therewith, and all lands, rights of way and easements necessary for holding and preserving such water, and for conveying the same to any part of the town of Rockport.

Acting under this statute, the town took Cape Pond, and now holds it. I understand from your letter that the pond is, and from time immemorial has been, a pond resorted to by alewives during the spawning season, which enter through a stream called Alewife Brook.

Your letter further states that recently the source of the brook has been obstructed by a wire screen, which prevents alewives from entering the pond during their spring migration from the sea, the result being the destruction of the fishery in the brook and in the pond. The obstruction was placed by officers of the town.

It is well settled that the statute authorizing the town to take Cape Pond does not take away any public rights in said pond, excepting so far as they are necessarily lost in the exercise of the right conferred upon the town to use the waters of the pond as a source of water supply. The right of fishing remains unimpaired, as well as all other public rights, subject to the limitations I have stated. *Rockport v. Webster*, 174 Mass. 385.

It follows that the town has no right to obstruct the passage of fish, unless it can show that the waters of the pond are thereby rendered unsuitable for drinking purposes. The burden of showing this fact is upon the town, and, in the absence of any proof to that effect, the passage of fish into the pond may not lawfully be obstructed.

Inasmuch as the rights of all parties are derived from the General Court, I beg to suggest that, if it is found impossible to obtain an amicable adjustment of the question, the Legislature should be called upon to take such action as may be deemed necessary to secure the rights of the public, as well as the rights of the town.

MASSACHUSETTS SCHOOL FUND — PAYMENT FOR BENEFIT OF TEACHERS.

It was not the intention of the Legislature that the payment for the benefit of teachers, provided for in St. 1896, c. 408, should be deducted from the half of the school fund set apart by St. 1891, c. 177, for the support of the public schools.

The amount required to carry out the purposes of the statute of 1896 is clearly included within the class of expenditures for "other educational purposes," to which the other half of such fund is appropriated.

To the
Auditor.
1900
December 28.

The division and appropriation of the Massachusetts school fund was regulated by St. 1891, c. 177. This statute provided that: "One half of the annual income of the school fund of the

Commonwealth shall be apportioned and distributed [among the small towns of the Commonwealth] without a specific appropriation, for the support of public schools." After specifying in detail the proportions to be paid to the several towns of the Commonwealth, the section thereupon provides that: "All money appropriated for other educational purposes, unless otherwise specially provided, shall be paid from the other half of said income. If the income in any year exceeds such appropriations, the surplus shall be added to the principal of said fund."

Various statutes make appropriations for educational purposes from the other half of the income. Among them are the salary of the secretary, the support of normal schools, teachers' institutes, county teachers' associations, and the Massachusetts Teachers' Association.

St. 1896, c. 408, is as follows: "With the approval of the state board of education there may be paid from the income of the school fund, to any town having a valuation of less than two hundred and fifty thousand dollars, a sum not exceeding two dollars per week for the actual time of service of each teacher, approved by the school committee of said town after special examination as to exceptional ability, employed in the public schools of said town, which sum shall be added to the salary of each teacher." Although in terms the payment authorized by this statute is made to the towns of the Commonwealth, it is in fact for the benefit of public school teachers as rewards for meritorious service, and does not benefit the tax payers of the town. The half of the school fund, on the other hand, appropriated by the statute of 1891 to small towns, goes to the treasury of such towns, and is intended to assist them in maintaining their schools.

The question submitted by your letter of the 12th inst. is whether the payment for the benefit of teachers, provided for by the statute of 1896, is to be deducted from the whole fund before division; and, if not, whether it is to be paid from the half to be "distributed without specific appropriation for the support of public schools," or whether it shall be paid from the other half of the income, "appropriated for other educational purposes."

I see no reason to doubt that it was the intention of the Legislature, in enacting the statute of 1891, to give to small towns one-half of the gross income of the school fund, leaving it to future Legislatures to provide, from time to time, for the expenditure of the remaining half for educational purposes, other than the support of the public schools. The amount required to carry out the purposes of the statute of 1896 should not, therefore, be deducted, in whole or in part, from the half of the school fund set apart for the support of public schools. It is clearly included in the class of expenditures for "other educational purposes," to which the other half is to be appropriated. The inducement to good work, held out to teachers by the terms of the statute, is an educational purpose, quite distinct from the mere support of public schools.

COMMONWEALTH'S LAND — DEED — RESTRICTION.

Where deeds from the Commonwealth to certain grantees, of land formerly belonging to the Commonwealth, contain the stipulation that buildings erected thereon "shall not, in any event, be used . . . for any mechanical or manufacturing purposes," any use of the estates in question for other than residential purposes would be a violation of the restriction.

To the
Board of
Harbor and
Land Com-
missioners.
1901
January 2.

I have your letter of the 26th, submitting to this office certain questions with regard to the construction of the stipulations in the deeds of the Commonwealth that buildings erected upon the Back Bay "shall not, in any event, be used for a stable, or for any mechanical or manufacturing purposes."

It is stated in your letter that the specific inquiry arises from a request by certain property owners who desire to learn "whether they may lease their houses and premises, without violating the stipulations aforesaid, for any of the following purposes: first, for decorating of pottery, with a furnace in the cellar for baking it; second, for a boarding-house, on condition of placing a small power engine for elevators and steam laundry apparatus, with the privilege of extending the business of the laundry; third, as a tailoring establishment, with a small power engine for elevators and to run the sewing machines on all the floors."

I am of the opinion that any use of the estates in question for other than residential purposes would be a violation of the stipulations in the deed. Such a use of the premises does not exclude the use of engines, boilers and machinery, so far as they may properly be employed in connection with the use of the house as a residence; otherwise, if for purposes of trade or business.

If the proposed uses, as above quoted, are for the carrying on of a business, and not incidental, merely, to the use of the house as a residence, they come within the spirit of the stipulation and are barred by its terms.

STATE CONTRACTS — REGULATIONS REGARDING AWARD — PREFERENCE OF HOME INDUSTRIES.

With the exception of Pub. Sts., c. 221, §§ 54-58, there are no laws, rules or regulations in regard to the awarding of State contracts.

There is no law containing any provision for the preference of home industry, in case some manufacturer of another State of the Union, or a foreign firm, offers the lowest bid.

I have the honor to acknowledge the receipt of the letter written to you by George de Szögyény, submitting certain inquiries in regard to contracts for public works and also the employment of labor therein.

To the
Governor.
1901
January 4.

1. I know of no laws, rules or regulations relating to the awarding of State contracts for the construction of and repairs upon public buildings, or for supplying the different articles of manufacture needed by the different departments and by the State militia, excepting Pub. Sts., c. 221, §§ 54-58. These in substance provide that contracts on account of the prisons of the Commonwealth shall be made with the warden, in writing, subject to the approval of the Prison Commissioners, and, further, that when, in the opinion of the commissioners, it can be advantageously done, the principal articles purchased for the use of the prisons shall be contracted for by the year, and that public notice shall be given of the articles needed, the quality and quantity thereof, and the time and manner of delivery; such proposals to be in writing and sealed. "The persons offering the best terms, with

satisfactory security for the performance, shall be entitled to the contract, unless it appears to the commissioners that it is not for the interest of the state to accept any of the proposals, in which case no offer shall be accepted;" and the warden shall thereupon proceed to make contracts in such way as can best be done for the interests of the Commonwealth.

The foregoing answers the inquiry submitted, which relates only to State contracts. I may, however, add that a statute enacted in the year 1897 regulates with much particularity contracts made by counties.

2. There is no law containing any provision for the preference of home industry, in case some manufacturer of another State of the Union or a foreign firm offers a lower bid.

MASSACHUSETTS HIGHWAY COMMISSION — PUBLIC SHADE TREES
— TREE WARDENS.

Tree wardens, elected in accordance with St. 1899, c. 330, may not interfere with or overrule the authority of the Massachusetts Highway Commission, but, subject to such authority, their duty of police jurisdiction over shade trees in State highways is the same as that with relation to other public shade trees in towns.

To the
Massachusetts
Highway
Commission.
1901
January 5.

Your letter of November 30 requires the opinion of the Attorney-General upon the question whether the Massachusetts Highway Commission have control over trees located on the State highways. I assume that the question refers principally to shade trees, for there can be no question of your exclusive jurisdiction over other trees.

St. 1899, c. 330, is an act to codify and amend the laws relative to the preservation of trees. This act provides for the election, in every town, of a tree warden. His duties are thus defined: "He shall have the care and control of all public shade trees in the town. . . . He shall expend all funds appropriated for the setting out and maintenance of such trees. He may prescribe such regulations for the care and preservation of such trees, enforced by suitable fines and forfeitures, . . . as he may deem

just and expedient. . . . It shall be his duty to enforce all provisions of law for the preservation of such trees."

Another section makes it the duty of the tree warden to plant shade trees in the public ways when money therefor has been appropriated by the town. Section 3 forbids the cutting or removal of a shade tree, excepting after notice and a hearing.

This act is general in its terms, and applies to all public shade trees. I am of the opinion that it includes shade trees upon State highways, and that tree wardens have jurisdiction over such trees, excepting so far as the statutes defining the duties of the Highway Commission are inconsistent therewith.

The authority of the commission over trees located on State highways is set forth in the following acts and parts of acts:—

St. 1893, c. 476, § 14, provides that no trees shall be planted or removed upon the State highway "except by the written consent of the superintendent of streets or road commissioners of a city or town, approved by the highway commission, and then only in accordance with the rules and regulations of said commission."

St. 1894, c. 497, § 7, is as follows: "Said commission shall keep all state roads reasonably clear of brush, and shall cause suitable shade trees to be set out along said highways when feasible, and shall renew the same when necessary."

These provisions, relating to the authority and duties of the Highway Commission, are not repealed by the tree warden act above referred to. On the other hand, they do not operate to take away all jurisdiction of the tree warden in State highways. He may not interfere with or overrule the authority of the Massachusetts Highway Commission, but, subject to their rights, his duty of police jurisdiction over shade trees in State highways is the same as that with relation to other public shade trees in the town.

STATE OFFICERS — PRESIDENTIAL ELECTORS — OATH OF OFFICE.

Since the duty of presidential electors is to the State, their function being to cast the vote of the State in its behalf and as its agents, they are State officers, and must take and subscribe the oaths required thereof by the Constitution. The provisions of the Constitution of the United States relating to such electors merely establish a method by which the States may exercise their right of voting in proportion to their population.

To the
Secretary.
1901
January 9.

I am informed that the opinion of the Attorney-General is requested upon the question whether presidential electors should take and subscribe the oaths required by the Constitution of Massachusetts, c. 6, Art. I, as amended by Art. VI. of the Amendments. These articles provide, in substance, that the oaths as set forth therein "shall be taken and subscribed by every person chosen or appointed to any office, civil or military, under the government of this Commonwealth, before he shall enter on the duties of his office." The precise question, therefore, is, whether presidential electors are officers under the government of this Commonwealth within the meaning of the language quoted.

The office of presidential elector is created by the Constitution of the United States, which provides, in Art. II., § 1, as follows: "Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the state may be entitled in the congress."

Under the authority of this article, the State of Massachusetts has by legislative enactment (Pub. Sts., c. 9, § § 9-18) provided that electors shall be chosen by the people of the Commonwealth at the time of the annual election in November. It by no means follows, however, that, because they are chosen by the people of the Commonwealth under the provisions of a State statute, they are State officers. Representatives to the Congress of the United States are also so chosen; but it would scarcely be contended that the latter are State officers, or that they are required to take the oaths prescribed by the Constitution of Massachusetts for such officers. On the other hand, it does not necessarily follow that, because the authority for the choice of presidential electors

is found in the Constitution of the United States, they are, therefore, Federal officers.

I apprehend that the true criterion is this: Do they perform a State or a Federal duty? An examination of the provisions of the Constitution of the United States, relating to the election of President and Vice-President, makes it plain that it was the intent of the framers of that instrument that the President and Vice-President should be elected by the States of the Union, rather than by a national popular vote. It is not necessary, even, that there be a popular vote in each State, for, as is well known, electors, in one State at least, were for many years chosen by its Legislature.

The provisions relating to presidential electors merely establish a method by which the States in proportion to their population shall exercise their right of voting. The function of the electors is to cast the vote of the State in its behalf and as its agents. Their duty is to the State, and is performed for the State. The only duty they owe to the Federal government is to report the result of their action to the Congress of the United States. They are, therefore, State officers.

Other provisions of the Constitution confirm this view. The article above quoted provides that electors shall not hold any "office of trust or profit under the United States." If the framers of the Constitution had regarded electors as Federal officers, the language undoubtedly would have been "shall hold no other office," etc. There is no other provision relating to the qualifications of electors. Furthermore, there is no provision in the Constitution for payment for their services from the treasury of the United States, nor is there any reservation of any right by Congress to control the manner of their election. The only right reserved to Congress in that respect is to determine the time of choosing the electors and the day on which they shall give their votes. U. S. Const., Art. II., § 1.

On the other hand, representatives to Congress must be chosen "by the people of the several states" (Art. I., § 2), and at such time and in such place and manner as may "be prescribed in each state by the legislature thereof" (Art. I., § 4); but the

latter article further provides that Congress may at any time by law make or alter such regulations. The qualifications of representatives are fixed by the Constitution, and § 6 of Art. I. provides that they shall receive compensation for their services, to be ascertained by law and paid out of the treasury of the United States.

For these reasons I am of the opinion that presidential electors are within the description of those officers who are required under the Constitution of Massachusetts to take and subscribe the oaths therein specified.

PUBLIC BOXING MATCHES — CONSTITUTIONAL LAW.

St. 1896, c. 422, provides penalties against two classes of offenders: first, those who engage in public boxing matches of all kinds; and, second, those who engage in professional boxing in public or private.

In the construction of statutes a limiting clause is to be restrained to the last antecedent, unless the subject-matter requires a different construction.

To the District
Attorney of
the Eastern
District.
1901
January 9.

Replying to your oral inquiry of this morning, I beg to say that in my opinion St. 1896, c. 422, provides penalties against two classes of offenders, to wit (using the language of the statute): first, "whoever engages in or gives or promotes a public boxing match or sparring exhibition," and, second, whoever "engages in a private boxing match or sparring exhibition, for which the contestants have received or have been promised any pecuniary reward, remuneration or consideration whatsoever, either directly or indirectly." In other words, the two evils aimed at by the Legislature were public boxing matches of all kinds, and professional boxing in public or in private.

Several reasons lead me to this conclusion: —

1. The history of the act, as appears by the Legislative Journal, shows that the bill first introduced and referred to the committee upon the judiciary (House Doc. No. 16) was a bill to prohibit public boxing matches. It provided, in substance, that whoever should engage in a public boxing match or sparring exhibition should be punished, etc. The clause relating to private boxing matches, in which parties contested for pay, was inserted by the

committee who reported the bill back to the House in substantially the form in which it now appears.

2. It is a general rule of law that in the construction of statutes a limiting clause is to be restrained to the last antecedent, unless the subject-matter requires a different construction. *Cushing v. Worrick*, 9 Gray, 382. *Vid. also Commonwealth v. Kelley*, 177 Mass. 221. The rule so laid down governs this statute, unless the plain language of the Statute requires otherwise.

3. The evil sought to be remedied by the Legislature was that of public boxing matches. If such exhibitions are injurious to public morals, as the Legislature seems to have considered, they are equally so whether the contestants are paid or not. Such a match would be conducted in precisely the same manner and with the same results, whether the boxers were fighting for money or not, excepting, perhaps, that in the former case they might contest with more zeal, although that does not necessarily follow. The clause relating to private exhibitions was obviously designed to permit athletic clubs to further the presumed purposes of their organization by allowing their members and other persons to spar before members of the club and their guests, provided the sparring contest did not become a prize fight because of professionalism.

BOARD OF HARBOR AND LAND COMMISSIONERS — AUTHORITY TO ESTABLISH BOUNDARY LINES IN TIDE WATERS.

The Board of Harbor and Land Commissioners is not authorized, under St. 1881, c. 196, § 1, to establish boundary lines in tide waters between towns created after the passage of such statute.

I am of opinion that St. 1881, c. 196, § 1, does not give the Board of Harbor and Land Commissioners authority to establish boundary lines in tide waters between towns created after the passage of the act. If this be so, the Board has no right to establish the line between Bourne and Sandwich, the town of Bourne having been created after the passage of the act, and legislative action is necessary to establish such line.

To the Topo-
graphical
Survey Com-
mission.
1901
February 1.

No controversy arises upon the Buzzard's Bay side, the line having been fixed by the Legislature. I may add that it would be absurd to suppose that the Legislature intended to permit any part of the shore line of Bourne to remain in the jurisdiction of Sandwich, notwithstanding the set-off of the town of Bourne.

DOGS — INJURY TO DOMESTIC ANIMALS — "WORRYING."

Under Pub. Sts., c. 102, § 98, as amended by St. 1889, c. 454, providing compensation for loss "by the worrying, maiming, or killing" of domestic animals by dogs, any sort of attack by a dog, intended to frighten a domestic animal, is "worrying" within the meaning of the statute.

To the
Controller
of County
Accounts.
1901
February 1.

Your letter of January 3 states the following case: a man was driving a horse on the highway when a dog suddenly ran out and barked at the horse, causing him to rear, and when the horse's feet came down, one of his legs was broken, so that it became necessary to kill him.

The opinion of the Attorney-General is required upon the question whether, upon these facts, the county is liable for damages for the killing of the horse, under the provisions of Pub. Sts., c. 102, § 98, as amended by St. 1889, c. 454.

The statute provides that whoever suffers loss by the worrying, maiming or killing of his sheep, lambs, fowls or other domestic animals, by dogs, may inform the officer of police; and that thereupon appraisers shall be appointed to appraise the damage, and that a certificate of the damages found shall be returned to the county treasurer, and the treasurer shall submit the same to the county commissioners, who, after examination, shall issue an order upon the treasurer for all or any part thereof as justice and equity may require.

It is settled that a horse is a domestic animal within the meaning of this statute. *Osborn v. Selectmen of Lenox*, 2 Allen, 207. Whether the act of the dog in the case in question could be characterized as "worrying," within the meaning of the word as used in the statute, is a more difficult question. Undoubtedly the meaning of the word as defined by lexicographers imputes seiz-

ing and biting. In *Osborn v. Lenox* the horse was bitten by the dog, and no question as to whether the acts of the dog constituted "worrying" arose.

I am of opinion, however, that any sort of attack by a dog, intended to frighten a domestic animal, is "worrying," within the meaning of the statute. It is not necessary to the remedial purpose of the statute that injuries for which compensation is to be made be limited to those caused by actual seizing and biting. Indeed, in the case of some animals, as, for example, fowls, such a limitation of the purpose of the meaning of the statute would entirely defeat its purpose. The same word in statutes of other States has been held to mean "running after, chasing, and barking at." *Marshall v. Blackshire*, 44 Ia. 475. See also *Campbell v. Brown*, 1 Grant (Pa.), 82; *Johnson v. McConnell*, 80 Cal. 545.

I am of opinion, therefore, that the claim in question was one which could properly be allowed under the statute.

INSURANCE — CHANGE FROM ASSESSMENT TO "OLD LINE"
BUSINESS — LIEN ON POLICY — RESERVE — ASSET.

Where an insurance company, in changing from an assessment to a level premium business, enters into an agreement with the insured, by which the latter exchanges an assessment for a new level premium policy, as of the date of the original insurance, giving to the company a lien upon the new policy for the amount of the reserve which would have accumulated if such policy had been taken out at the time when the assessment insurance was taken, the amount of the lien is not an asset of the company, and is not to be credited to it as such.

It is therefore the duty of the Insurance Commissioner to regard the contract as a contract of insurance for the face value of the policy, less the amount of the lien created thereon.

Your letter of January 4, after quoting St. 1900, c. 363, providing that the Insurance Commissioner shall annually compute the reserve liability of insurance companies and examine the financial status of such companies, states that certain insurance companies which, under the laws of Massachusetts, have been compelled to change from assessment to level premium business, have attempted to meet the difficulties arising from such change in the following manner:—

To the Insur-
ance Com-
missioner.
1901
February 1.

No reserve was accumulated during the continuance of the assessment policies; and if such policies were to be exchanged for level premium policies with the rate of premium fixed as of the age when the original policy was taken out, the companies would not have, and could never accumulate, a reserve sufficient to protect the policy under the requirements of the Massachusetts statutes. Accordingly, at the time of such exchange they induced the insured to enter into an agreement by which the company was given a lien upon the new policy for the amount of the reserve which they ought to have on hand, regarding the level premium policy as having been taken out at the time the assessment insurance was placed.

The result of this arrangement is that a policy, for example, which is nominally for \$1,000, has charged against it, by the assent of the insured, a sum of money (say, for example, \$300) representing the amount of reserve which the company should have on hand, assuming it to have been taken out when the assessment insurance policy was originally taken out.

The question submitted by your letter is whether you shall, as contended by such companies, compute the amount of insurance outstanding at the face value of the policy, and include among the assets the liens in question.

The face value of the policy is reduced by the exact amount of the lien so created; so that, in the supposed case above stated, it becomes, in effect, a contract for \$1,000 less \$300. This, obviously, is nothing more than a contract to pay \$700. The policy should, therefore, be regarded, for the purposes of your valuation, as a policy for \$700. It follows that the amount of the lien is not an asset in the hands of the company, and is not to be credited to it as such.

It is contended by the companies that the transaction in question is, in effect, a loan upon the security of the policy, and that it is to be so regarded in your computation. The difference, however, between such loans and the arrangement in question illustrates and confirms the soundness of the views I have expressed.

The real face of a policy of insurance is the amount which the

company would be bound to pay if the insured should die the day the policy is taken out. This amount is not varied by subsequent arrangements between the insured and the company. If, therefore, after the policy is written and delivered, the company makes a loan, it does not diminish the face of the policy and has no effect upon the valuation.

But, under the arrangement in question, the policy in its inception is insurance, not for the face value of the policy, but for the net amount after deducting the amount of the lien. Real loans are assets because the company's liability is diminished by the amount of each loan; but these alleged loans are not assets because the company was never liable for them.

I am of opinion, therefore, that it is your duty to decline to inflate the two sides of the account by taking the face of the policy, upon the one hand, and regarding the lien as an asset, upon the other hand; but that you are to regard the contract what it is in fact, to wit, insurance for the face of the policy less the amount of the lien created thereon.

FIREMEN — "FIREMEN'S RELIEF FUND" — PERSONS IMPRESSED INTO SERVICE OF REGULAR FIRE DEPARTMENT.

Persons who have been impressed into the service of a regular organized fire department of a city or town, and receive injuries while in the performance of the duties required of them, are not entitled to relief under the provisions of St. 1892, c. 177, relating to the "Firemen's Relief Fund."

Your letter of January 21 requires my opinion upon the question whether certain persons referred to in the papers annexed to the letter are entitled to relief under the provisions of St. 1892, c. 177, relating to the firemen's relief fund, of which your Board has the disbursement.

To the Board
of Commis-
sioners of the
Firemen's
Relief Fund.
1901
February 5.

It appears by the documents submitted that a disastrous fire occurred in Foxborough in June last. Foxborough is a town which had at the time an organized fire department. Some of the regular members of the fire department were absent, and in consequence of the fierceness of the fire the men in question were

impressed into the service by the engineers, and received their injuries while performing the duties of firemen.

The chapter in question provides, in § 2, that the fund shall be used "for the relief of firemen." It provides further, in § 4, that members of incorporated protective departments shall be eligible for benefits as well as "any person doing fire duty at the request, or upon the order of the authorities of any town having no organized fire department."

It is obvious that the word "firemen" in the second section does not mean any person who is engaged in extinguishing a fire. Otherwise, there would have been no occasion for the language above quoted in the fourth section, which includes, in addition to "firemen," persons doing fire duty where there is no organized fire department. It follows that the meaning of the word "firemen" must be sought in the statutes.

Pub. Sts., c. 35, §§ 28-39, inclusive, authorize the selectmen of a town to establish a fire department, and provide for the method of creating the same. Section 31 limits the number of men to be employed on the several engines, hose carriages, and hook and ladder carriages, as well as in each fire company. These companies, by § 32, may organize, elect officers, establish rules and regulations, and annex penalties for the breach of the same. They may also have certain exemptions from other public duties, such as jury duty (Pub. Sts., c. 170, § 2). These rights and privileges are doubtless conferred in consideration of the fact that they have volunteered to hold themselves in readiness at all times, seasonable or unseasonable, to perform what may often be a hazardous and difficult task.

I see no reason to doubt that the purpose of the statute establishing the firemen's relief fund was further to recognize their services by compensating them for injuries received in the performance of their duty. It was the intent of the Legislature to encourage men to enlist in organized fire departments by holding out the inducement of compensation.

It is otherwise with one who is impressed into service, upon a single occasion, and who has not chosen to connect himself regularly with the fire department. It seems to have been the pur-

pose of the Legislature, carefully to exclude such persons and to extend the relief provided by the statute only to regular members of the fire department, where there is a fire department; the only exception being in favor of persons doing fire duty in towns where there is no such organized fire department. I am led to the conclusion, therefore, that however meritorious the services of the persons in question may have been, they are not entitled to relief from the fund in charge of your Board.

BOARD OF HARBOR AND LAND COMMISSIONERS — CAPE COD
CANAL — APPROVAL OF PLANS.

The charter of the Cape Cod canal, St. 1899, c. 448, § 4, imposes upon the Board of Harbor and Land Commissioners the duty of determining in what manner the canal shall be constructed, including all questions relating to locks, tide-gates and other such structures.

The charter of the Cape Cod canal, St. 1899, c. 448, provides in § 4 that the corporation shall file with your Board "a plan of the proposed location, and a plan of the proposed construction thereof." It is the duty of the Board thereupon to hear the parties, require such modification, if any, as it may desire, and to approve the plans as filed or as modified.

To the
Board of
Harbor and
Land Com-
missioners.
1901
February 11.

Section 6 provides that the joint Board of Harbor and Land Commissioners and the Railroad Commissioners shall "determine at what point or points the railroad of the Old Colony Railroad Company shall cross said canal by a drawbridge or bridges, or by a tunnel or tunnels constructed under said canal." The section further provides that the canal company shall construct its canal "with such structures and appliances for its protection and use as said joint board may order, together with such bridge or bridges, tunnel or tunnels, ferries and changes of highways, under the supervision of said joint board, as shall be in accordance with plans approved by them and in conformity with such orders as they may make."

The precise question submitted by your letter of February 5 is as follows: "Should this Board, under § 4, approve a plan of

construction which did not include a lock, or locks, or gates, would it be in the power of the joint Board, under § 6, to order such structures to be built?"

I very much doubt whether your Board has the right to my opinion upon the question submitted. It is rather for the joint Board, if a situation shall arise before that Board which will make it material. But it may not be amiss for me to submit my views as to the duty of your Board under § 4, above quoted. It imposes, in my opinion, upon your Board the duty of determining in what manner the canal shall be constructed. This includes all questions relating to locks, tide-gates and other such structures. You are to have in view the use of the canal for purposes of navigation, and to determine what method of construction will be the safest and most convenient in view of all the facts and probabilities, including the probable rate of tide in the canal, and how far its current may make navigation dangerous if unrestrained by structures intended to prevent such movement.

You have no means of knowing, of course, whether the joint Board will order the crossing in question to be effected by a tunnel or a bridge, but I assume that it is not unreasonable for you to anticipate that bridges, either for the railroad or for highways, will be necessary. In all events, the question of such probability is before you, and it is your duty to order the construction of the canal in such manner as will provide for all these circumstances and probabilities. The determination, therefore, of the question of locks and gates is confided to the discretion of your Board.

The obvious purpose of § 6 is to submit to the joint Board all questions concerning the crossing of the canal by the railroad company. These questions are submitted to the joint Board rather than to your Board, for the reason that they involve on the one hand the considerations affecting railroad transportation, and those affecting navigation on the other.

The precise question whether the joint Board will have jurisdiction to order the construction of locks, in case you shall have approved plans which do not call for such structures, is one which does not concern, in my judgment, your duty under § 4, and which may well be determined when, if ever, it arises.

SAVINGS BANKS — AUTHORIZED INVESTMENTS — GUARANTY.

An agreement to purchase first mortgage bonds for their face value at the time and place of the maturity of such bonds is not equivalent to a guaranty, as required by St. 1894, c. 317, § 21.

Among the investments by savings banks in this Commonwealth authorized by St. 1894, c. 317, § 21, are the first mortgage bonds of certain railroad companies, "guaranteed" by certain other railroad companies (paragraph b, third clause).

To the
Board of Com-
missioners of
Savings
Banks.
1901
February 12.

What professes to be the guaranty of a bond by a railroad company coming within the description of the act is, in terms, an agreement to purchase the bond at its face value at the time and place of the maturity of the bond. The question submitted by your Board is whether this agreement is equivalent to a guaranty.

I have already advised your Board (1 Op. Atty.-Gen. 149) that any agreement which is equivalent in law to a guaranty is within the spirit of the statute. I am unable, however, to interpret the agreement in question as equivalent to a guaranty. The essence of the agreement is time and place, whereas a guaranty is not so limited. If the holder of the bond fails to present it for purchase on the day and at the place named in the agreement, the promisor is thereafter discharged. It would be otherwise as to a guaranty.

CAPE COD CANAL — HARBOR AND LAND COMMISSIONERS — LOCKS
— JURISDICTION OF JOINT BOARD.

Under the provisions of the charter of the Boston, Cape Cod and New York Canal Company (St. 1899, c. 448), the jurisdiction of questions of location and construction is confided to the Board of Harbor and Land Commissioners; the joint Board of Harbor and Land Commissioners and Railroad Commissioners, therefore, has no jurisdiction over the question of locks, except in the matter of the crossing of the canal by the Old Colony Railroad Company, as provided in § 6.

Your letter of March 14 states that the plans of the Boston, Cape Cod and New York Canal Company have been approved by the Board of Harbor and Land Commissioners, in accordance

To the
Board of
Railroad Com-
missioners.
1901
April 6.

with the provisions of the charter of the company (St. 1899, c. 448, § 4), and are now before the joint Board of Harbor and Land Commissioners and the Railroad Commissioners for action by the Board under the provisions of § 6 of the same statute. Your letter further states that the Board of Harbor and Land Commissioners approved the plans "without having determined the necessity of locks," and requires the opinion of the Attorney-General upon the question whether, in view of that fact, the joint Board has jurisdiction of the question of locks.

The jurisdiction of the joint Board is, in my judgment, in no way dependent upon the action of the Board of Harbor and Land Commissioners. The charter in separate sections (4 and 6) clearly points out the duties devolving upon each Board, and the authority and responsibility of each Board are to be found in those provisions. Yours is not a board of appellate but rather of original jurisdiction.

In a letter to the Board of Harbor and Land Commissioners dated February 11, 1901 (2 Op. Atty.-Gen. 255), I pointed out what appeared to me to be the duties of that Board in these words: "You are to have in view the use of the canal for purposes of navigation, and to determine what method of construction will be the safest and most convenient in view of all the facts and probabilities, including the probable rate of tide in the canal, and how far its current may make navigation dangerous if unrestrained by structures intended to prevent such movement."

To these views, after the re-examination made necessary by the request of your Board for an opinion, I still adhere. The scheme of the statute, although not always expressed in the clearest terms, appears to me to be as follows: the company chartered must, within four months, file with the Harbor and Land Commissioners a plan of the proposed location, and "a plan of the proposed construction thereof." I see no reason to doubt that the word "construction" necessarily includes and was intended by the Legislature to include all things appertaining to the construction of the canal, including the question of locks, which, I take it, is one of the most important questions touching the construction of a canal.

Before filing such plans the company must deposit with the Treasurer of the Commonwealth the sum of two hundred thousand dollars, to be held as security for the payment of damages occasioned by the taking of land. If the plans are not approved by the Board of Harbor and Land Commissioners, or if the modifications ordered by them are not acceptable to the company, it may withdraw its deposit and forfeit its rights under the charter (§ 23). But if, on the other hand, it is content with the plans of location and construction as finally approved by the Harbor and Land Commissioners, the deposit cannot be withdrawn, and whatever future action the company may take, its deposit must remain in the treasury.

It is apparent, therefore, that the question of the approval of the plans by the Harbor and Land Commissioners is one of vital importance to the company. If, for example, the plans as finally adopted by that Board require a method of construction which, in the opinion of the company, is too expensive to be profitable, the opportunity is given it to abandon its project and receive its money back. It has a right, therefore, to know, before going further, just what is required of it in the way of location and construction.

Furthermore, the jurisdiction of the question of location and construction is confided to a Board which is presumed to be especially familiar with that subject, and which can adequately represent the interests of the Commonwealth and of the public. It is the duty, therefore, of the Harbor and Land Commissioners to settle all questions of construction, with one exception. That exception is the matter of the crossing of the canal by the railroad company. The jurisdiction of this question is given to a joint Board, consisting of the Railroad Commissioners on the one hand and the Harbor and Land Commissioners on the other, it being presumed that conflicting questions between the railroad and the canal are properly submitted to such a tribunal. Section 6, therefore, provides that such joint Board shall "determine at what point or points the railroad of the Old Colony Railroad Company shall cross said canal by a drawbridge or bridges, or by a tunnel or tunnels constructed under said canal." Such

joint Board, after due notice, "shall determine said questions, and the decision of a majority of said joint board shall be final. Said canal company shall construct its canal with such structures and appliances for its protection and use as said joint Board may order, together with such bridge or bridges, tunnel or tunnels, ferries, and changes of highways, under the supervision of said joint Board, as shall be in accordance with plans approved by them."

All questions, therefore, which may arise concerning the manner of the crossing of the canal by the railroad company, and they only, are within the jurisdiction of the joint Board.

The determination of these questions may incidentally involve the further question whether, for the protection of the canal on the one hand or the railroad on the other, locks may be required, and it is in that aspect only that your Board has to determine any question concerning locks. Questions of navigation, of the velocity of the tide, and all other matters incidental to the question of the necessity of locks, are presumed to have been determined by the Board of Harbor and Land Commissioners before the plans come to your Board.

I do not forget that the words above quoted, "said canal company shall construct its canal with such structures and appliances for its protection and use as said joint Board may order," taken alone, might seem to give original jurisdiction to your Board of the question of locks. But I cannot believe the Legislature intended a divided responsibility. As I have already said, each Board has its own duties in the matter. Your Board is concerned only with the crossing of the railroad, and the words "structures and appliances" must be taken in connection with the rest of the section to refer only to the matters to which the section, as a whole, relates. This is still more apparent from the fact that after action by the Board of Harbor and Land Commissioners, the company, having elected to proceed, is not at liberty to withdraw and to receive back its deposit. It is not to be presumed that the Legislature having once given an opportunity to the company to take back its deposit and withdraw from the enterprise, if the conditions as to construction imposed

by the Board having jurisdiction of the matter are too onerous, should authorize another Board to reimpose the same conditions, when the time for withdrawal has elapsed.

I am of opinion, therefore, that the question of locks is not before your Board excepting so far as the necessity of them may arise in consequence of the method of crossing by the railroad company determined upon by the Board may require structures for the protection of the canal and of the railroad company.

STREET RAILWAYS — TRANSPORTATION OF LETTER CARRIERS —
CONSTITUTIONAL LAW.

St. 1897, c. 500, § 10, providing that the Boston Elevated Railway Company may establish a five-cent fare, and that such fare shall not be reduced by the Legislature for a period of twenty-five years, constitutes a contract between the Commonwealth and the company. A bill, therefore, requiring all street railways within the Commonwealth to furnish transportation to letter carriers on duty, upon payment to such companies by the United States of a fixed annual allowance, would be unconstitutional, if it reduced fares below five cents, in so far as it related to the Boston Elevated Railway Company, as a law impairing the obligation of contracts.

I have the honor to acknowledge the receipt of a copy of an order adopted by the honorable Senate on the tenth day of April inst., requiring the opinion of the Attorney-General upon the constitutionality of the bill relative to the transportation of letter carriers by street railway companies (printed as House Document No. 257), as amended by the Senate.

To the Senate.
1901
April 12.

The copy of the bill submitted in substance requires street railway companies operating within the Commonwealth to furnish transportation to all letter carriers of the United States while in uniform and in the performance of their duties, upon the payment each year, to the company or companies furnishing said transportation, by the United States, of an amount equal to the so-called "standing allowance for car fare," as determined for the postal fiscal year ending June 30, 1901 (plus any additional sum that may be hereafter granted).

No statement of facts accompanies the order. I presume, however, I am expected to assume that if the bill becomes a law, its

provisions will require transportation of letter carriers at a rate less than that collected from ordinary passengers; for if the sum allowed by the United States is equal to or greater than the revenue derived by street railway companies from transportation of letter carriers, no possible constitutional question can arise. In that event, indeed, there would seem to be no occasion for the passage of the act.

St. 1897, c. 500, § 10, provides that the Boston Elevated Railway Company, which is the lessee of the West End Street Railway Company, "may establish and take a toll or fare, which shall not exceed the sum of five cents for a single continuous passage in the same general direction upon the roads owned, leased or operated by it; and this sum shall not be reduced by the Legislature during the period of twenty-five years, from and after the passage of this act." A proviso follows which, however, is not material to the question submitted. This section, in my judgment, amounts to a contract between the Commonwealth and the Boston Elevated Railway Company, and that (excepting under the terms of the proviso referred to) the Legislature may not, during the term named in the statute, lawfully reduce fare below the sum of five cents fixed by the statute, without violating the provision of the United States Constitution (Art. I., § 10), which forbids a State to pass a law impairing the obligation of contracts.

I am of opinion, therefore, that the bill, so far as it concerns the Boston Elevated Railway Company, is unconstitutional.

I apprehend that as to other street railways within the Commonwealth the question of the constitutionality of the bill turns upon two propositions, to wit: first, whether the bill, if it becomes a law, will result in reducing the earnings of the company to such an extent that it will operate to deprive them of their property without due process of law within the meaning of the Fourteenth Amendment of the Constitution of the United States; and second, whether it denies the equal protection of the laws guaranteed to citizens in the same amendment by discriminating in favor of a certain class.

In 1900 a statute (c. 197) was enacted by the Legislature re-

quiring the transportation of scholars of the public schools for one-half of the rate charged to other passengers. A proceeding has been begun in the Circuit Court of the United States to test the constitutionality of this statute upon the grounds above stated. I have appeared in behalf of the Commonwealth, and the case is still pending and undetermined. The circumstances of that case are not in all respects the same as those which would arise under the bill now submitted, but in general the determination of the questions raised will depend upon the same considerations.

It will be my duty in that case to contend before the court that the statute is constitutional. I am not, therefore, in a position to consider the question with that degree of impartiality which should be required of the Attorney-General in advising your honorable body upon questions of law. For these reasons, I beg to be excused from answering the questions submitted, so far as relates to a railway company other than the Boston Elevated Railway Company, before the determination by the court of the case now pending.

STREET RAILWAYS — COMMON CARRIERS OF GOODS — CONSTITUTIONAL LAW.

Legislation authorizing street railway companies to use their tracks in the public highway as common carriers of goods, wares and merchandise, imposes no new servitude upon the owner of the fee of such highway, and is therefore constitutional.

I have the honor to acknowledge the receipt of an order adopted by the honorable Senate on the 18th inst., requiring the opinion of the Attorney-General as to the constitutionality of legislation which authorizes street railway companies to use their tracks in the public highways as common carriers of goods, wares and merchandise. The only question involved is whether such use of the tracks is a servitude not included in the original taking of the street for a public highway. If it was not so included, then the tracks could not be so used without additional compensation to the owner of the fee of the street.

To the Senate.
1901
April 23.

It has been determined by the Supreme Judicial Court in *Pierce v. Drew*, 136 Mass. 75, that the erection and use of a line of electric telegraph upon a public way, and in *Howe v. West End Street Railway Company*, 167 Mass. 46, that the maintenance of an electric railway operated by the overhead trolley system and used for the carriage of passengers, are among the servitudes to which the land of the owner becomes subject in consequence of the original taking for the highway. In *White v. Blanchard Co.*, 178 Mass. 363, the construction and use of a horse railroad for freight purposes on a highway was held not to entitle the owner of the fee in the street to damages. In the opinion in *Howe v. West End Street Railway Company*, it was said by Chief Justice Field that "the use made of a public way in the operation of an electric railway is of the same general kind as that for which the way was originally laid out, viz., the transportation of persons and things from place to place along the way."

Following the authority of these decisions, which, in my judgment, are decisive of the present inquiry, I am of opinion that legislation authorizing street railway companies to use their tracks in the public highway as common carriers of goods, wares and merchandise, would be constitutional.

CONSTITUTIONAL LAW — RATE OF WAGES ON PUBLIC WORKS — CITIES AND TOWNS.

The Legislature may provide that whenever the Commonwealth, or any county therein, enters into a contract with any person, firm or corporation, for the doing of public work of any nature, it shall be stipulated that such person, firm or corporation shall pay employees no lower rate of wages per day than is paid by the Commonwealth, or by such county, for similar work; but such a provision, as affecting cities and towns, would be unconstitutional, and cannot be cured by making the provision operative only upon acceptance by a majority of the voters of such cities and towns.

To the House
of Representatives.
1901
April 24.

I have the honor to acknowledge the receipt of a copy of an order adopted by the House of Representatives March 20, 1901, requiring the opinion of the Attorney-General upon the question whether the several provisions of House Bill No. 123 are in

accord with the Constitution of the Commonwealth and of the United States. The bill in question provides, in substance, in § 1, that whenever the Commonwealth, or any county, city or town therein, enters into a contract with any person, firm or corporation for the doing of public work of any nature, it shall be provided in said contract that such person, firm or corporation shall pay his or their employees no lower rate of wages per day than is paid by the Commonwealth, or by any such county, city or town, for similar work. Section 2 fixes certain limitations as to the hours of labor to be required by contractors under the same circumstances. Section 6 provides that the act shall not take effect, as to contracts made by the Commonwealth, until its acceptance by the voters of the Commonwealth; and as to contracts made by the city or town, it shall not take effect unless accepted by a majority of the voters of such city or town.

I see no reason to doubt that, so far as the act applies to contracts made under the authority of the Commonwealth, it is constitutional. The State as a sovereign may undoubtedly regulate the terms upon which its agents shall employ labor. No question can arise as to the rights of the contractor, for he is under no obligations to contract. If he does, he must submit to the terms imposed by the other party to the contract, to wit, the Commonwealth or its agents.

The same considerations undoubtedly govern the question of the constitutionality of the statute so far as it applies to counties. They have no other powers, rights or duties than are conferred by the Legislature which creates them. They are mere political divisions, established for the more convenient administration of the government of the Commonwealth.

I am of opinion, therefore, that so far as the act relates to the Commonwealth and to the counties of the Commonwealth it does not violate any provisions of the State or the Federal Constitution.

A far different question, however, arises as to so much of the bill as relates to cities and towns. These provisions fix an arbitrary price to be paid for labor by contractors for city or town

work. They also limit the hours of labor to be required by such contractors. I assume that the price so fixed may be in excess of the market price of such labor; and that the hours of labor so established are less than those usually fixed by private contracts. Otherwise there would seem to be no occasion for the passage of the bill.

If, therefore, the bill becomes a law, it will prohibit municipalities from exercising that freedom of contract which is enjoyed by other corporations and individuals; it will operate to increase the taxes of the citizens by requiring a larger expenditure for wages than would otherwise be necessary, at the expense of the citizens of the cities and towns affected by its provisions; and will tend to the benefit and profit of certain laborers to an extent not enjoyed by laborers generally.

It would scarcely be disputed, I apprehend, that a law containing such provisions, affecting private individuals and corporations, would be a violation of the liberties and privileges of citizens under the Declaration of Rights of the Massachusetts Constitution and under the Fourteenth Amendment to the Federal Constitution. In the exercise of the police power conferred by the Constitution, many laws limiting the rights of citizens in the making of contracts, and even prohibiting certain contracts, have been enacted by the General Court and sustained as constitutional by the Supreme Judicial Court. *Opinion of Justices*, 163 Mass. 589. But, so far as I am aware, since the beginning of constitutional government no attempt has been made to fix by legislation an arbitrary price of any commodity, including labor, that may properly be the subject of contract between parties. It may well be assumed that any such interference with the rights of individuals and private corporations would be pronounced to be beyond the scope of legislative power.

Certain apparent exceptions to this general proposition rest upon special considerations not applicable to the bill now under consideration. Laws regulating the compensation to be charged by public service corporations, such as common carriers and gas companies, stand upon considerations wholly apart from the general rule I have stated. Further examples of legislation of

this character are the statutes regulating the hours of employment of women and minors in certain factories, and those limiting the number of hours persons may be employed in operating street railway cars. Such laws are well within the authority conferred upon the Legislature to enact all manner of wholesome and reasonable laws, as they may be deemed to be for the good and welfare of the citizens of the Commonwealth. But a statute attempting to fix the price and hours of labor as between certain private contractors and their employees could not in my judgment be sustained as a legitimate exercise of the police power contained in the Constitution. It would tend to promote the pecuniary welfare of one class of citizens at the expense of another class.

Is the case different when legislation of this character is attempted as affecting the city or town? A municipality is, indeed, in many respects a mere political division of the Commonwealth. So far as it is intrusted with a part of the government of the State and her citizens, it is wholly under the control of the General Court. Politically, a town is the creature of the Commonwealth. It may be enlarged, diminished, or even annexed to another municipality. It may be governed, in whole or in part, by the officers of the Commonwealth. *Commonwealth v. Plaisted*, 148 Mass. 375.

But a town (and in this term, for convenience, I include cities as well) may be said to exist in two capacities, — the one political and governmental, and the other as a private corporation. I have considered its standing as a political division of the Commonwealth; but it is, also, a corporation enjoying many of the rights and privileges of other corporations. It may hold property to its own use, and enter into contracts relating thereto. It may receive gifts for municipal purposes and may raise money by taxation for the same purposes, the expenditure of which is within its exclusive control. Its property, however acquired, is its own, to which it has the same rights as any other corporation or individual, and of which it may not be deprived. It has the same liberty with respect to contracts for municipal purposes not affecting matters of government as a private person. For

example, a statute requiring a town to pay a price for its fire apparatus in excess of the price for which such things could be bought in the open market would be clearly objectionable.

The distinction between matters strictly municipal and those that are governmental is to be clearly borne in mind. As an illustration of this distinction, the Legislature has undoubtedly the right, on the one hand, to fix the salary of public municipal officers, like the mayor, or even a policeman, but not the wages of mere employees, who have no part in the government of the Commonwealth or of the town. They are the servants, not the officers, of the town, and to regulate their wages would be to exercise a control over the affairs of the town far different from that exercised in fixing the salaries of public officers. This distinction is clearly established by the courts. *Opinion of Justices*, 166 Mass. 589.

The bill in question, therefore, is an interference with the rights of a town to manage its own municipal affairs in matters having no connection with its political existence. It amounts, furthermore, indirectly, to the appropriation of its municipal property, whether raised by taxation or otherwise, for the benefit of individuals. The bill is as much an invasion of those rights as it would be of the rights of any other corporation.

The limitation of the provisions of the bill to contracts for public works in no way affects these considerations. The expression "public works" obviously applies to work done for the town as a municipality. Such work is public only in the sense that it is done for the benefit and use of the municipality.

I do not forget the further provision of the bill, that the act shall not take effect in any town until accepted by the voters thereof. But, in my judgment, this does not save it. It is not wholly clear how far the Legislature may authorize a majority of the voters of a town to impose on all its citizens a tax for private purposes. *Mead v. Acton*, 139 Mass. 341; *Opinion of Justices*, 175 Mass. 599. The effect of the bill, notwithstanding, is to increase arbitrarily the wages of the employee at the expense of the town. It not only binds the minority voter, but, if accepted by the town, it becomes binding for all time, and upon

all future voters who will have had no opportunity of election in the matter. Even if the voters of the town can commit themselves to an unlawful expenditure of public funds, they cannot, in my judgment, bind those who come after them.

Upon the whole, therefore, I am of opinion that the bill, so far as it relates to towns and cities, is unconstitutional. Whether this conclusion be based upon the proposition that it takes away the liberties and privileges of the municipality as a private corporation, or as authorizing the appropriation of the tax payers' money for private purposes, or as legislation partial in its character, makes but little difference. All these propositions are somewhat intermingled, and rest ultimately upon the broad proposition that the rights guaranteed to the citizen by the Constitution may not be impaired.

PHYSICIANS AND SURGEONS — PRACTICE OF MEDICINE — CHRISTIAN SCIENTISTS, OSTEOPATHISTS, ETC.

Under a proposed bill relative to the registration of physicians and surgeons, which provides that it shall be a misdemeanor for an unregistered physician or surgeon to practise or attempt to practise medicine, or to hold himself out as a practitioner of medicine, it cannot be held, as a matter of law, that pharmacists, osteopathists, clairvoyants, etc., do not practise or attempt to practise medicine.

I have the honor to acknowledge the receipt of a copy of an order adopted by the Honorable House of Representatives May 3, 1901, requiring the opinion of the Attorney-General upon a question therein submitted, which is as follows: —

To the House
of Representa-
tives.
1901
May 15.

“Does Senate Bill No. 281 prevent pharmacists, osteopathists, clairvoyants, or persons practising magnetic healing, mind cure, massage methods, Christian science, or cosmopathic methods, from treating patients by these various and respective methods, as is now permitted under the law?”

St. 1894, c. 458, is an act to provide for the registration of physicians and surgeons. Section 10 of the act, as amended by St. 1895, c. 412, provides that “Whoever not being registered . . . shall advertise or hold himself out to the public as a phy-

sician or surgeon . . . or appends to his name the letters 'M.D.', or uses the title of doctor, meaning thereby a doctor of medicine, shall be punished," etc. Section 11 of the same statute (St. 1894, c. 458), so far as it is material to the present question, is as follows: "This act shall not apply . . . to clairvoyants, or to persons practising hypnotism, magnetic healing, mind cure, massage methods, Christian science, cosmopathic or any other method of healing: *provided*, such persons do not violate any of the provisions of section ten of this act."

The language of § 11, above quoted, is somewhat peculiar. Literally construed it declares that the classes of persons enumerated shall not be affected by the act provided they do not violate its penal provisions; but it is scarcely necessary to say that so long as a person does not violate the provisions of a law he is not affected by it.

I am of opinion, however, that the section is to be more broadly construed, and that it was the intention of the Legislature specifically to declare that the persons enumerated are not to be regarded as holding themselves out to the public as physicians or surgeons so long as they confine themselves to their specialties. Adopting this construction of the section it is clear that under the original act the persons enumerated could carry on their respective callings without making themselves liable to the penal provisions of the statute.

The bill in question substitutes a new penal section for § 10 of the existing act; but it repeals § 11, and no similar provision is contained in the proposed bill, and I am of opinion that this omission seriously endangers the situation of the persons enumerated in § 11 of the existing law, for the reason that if the bill becomes a law it may be claimed that in attempting to heal persons by the methods employed in their respective callings they are to be deemed to be engaged in the "practice of medicine." In the broad sense of that term, it includes generally the art of healing, by whatever method. I am not familiar with the methods employed by the specialists enumerated. I can easily see, however, that it might be claimed, for instance, that one who undertook to heal diseases by cosmopathic methods, what-

ever they may be, might be deemed to be carrying on the "practice of medicine," and so come within the provisions of the bill. If, therefore, the Legislature intends to insure to the classes of persons enumerated in the question submitted, the right to pursue their respective callings without being required to be registered, they should be specifically exempted from the general prohibitions of the bill.

I may add that pharmacists are regulated by existing statutes. These statutes give them no authority to practise medicine. The bill in question gives them no additional powers.

AGRICULTURAL SOCIETY — BOUNTY FROM THE COMMONWEALTH.

An agricultural society, in order to be entitled to bounty from the Commonwealth under the provisions of Pub. Sts., c. 114, § 1, must be an organization local in its nature, composed chiefly of persons interested in agricultural pursuits, residing in the county within which it is located, and must maintain a permanent place in the county for its exhibitions, with the necessary buildings therefor.

The opinion of the Attorney-General is desired upon the question whether the New England Agricultural Society is entitled to receive the bounty provided for by Pub. Sts., c. 114, § 1.

To the State
Board of
Agriculture.
1901
May 17.

The society in question is incorporated under the laws of Massachusetts, but it owns no real estate or buildings in this Commonwealth, and its meetings are held in conjunction with those of other agricultural societies, and may be at any favorable time or place, either within or without the Commonwealth. It in no sense represents a county of the State, or any other geographical section.

I am of opinion that the society is not entitled to receive bounties under the statute. An examination of all the provisions of the chapter and of the history of legislation upon the subject makes it clear that the agricultural societies referred to in the statutes of the Commonwealth are local associations, whose purpose is to promote agricultural interests in the section of the State in which they are located. In every instance in which such a society has been admitted to the benefits provided by the

statutes, it has been an organization local in its nature, composed chiefly of persons interested in agricultural pursuits, residing in the county where it is located, and which has established and maintained a permanent place in the county for its exhibition buildings. The whole purpose of legislation upon the subject has been to foster the interests of agriculture by dividing the State into sections, usually counties, in each of which a society has been incorporated and supported mainly by those living in such county or subdivision of a county.

The section granting the bounty clearly makes it manifest that the Legislature had in view societies having exhibition grounds and buildings. The section is as follows: "Every incorporated agricultural society which was entitled to bounty from the Commonwealth before the twenty-fifth day of May in the year eighteen hundred and sixty-six, and every other such society whose exhibition grounds and buildings are not within twelve miles of those of a society then entitled to bounty, and which has raised by contribution of individuals and put out at interest on public or private security, or invested in real estate, buildings, and appurtenances for its use and accommodation, one thousand dollars, as a capital appropriated for its uses, shall, except when otherwise determined by the state board of agriculture as provided in section three, be entitled to receive in the month of October annually, out of the treasury of the Commonwealth, two hundred dollars," etc.

The earliest statute upon the subject was St. 1819, c. 114, "An act for the encouragement of agriculture and manufactures," which contained, in § 1, a provision not unlike that in the Public Statutes, requiring an invested capital of \$1,000 before incorporated agricultural societies within the Commonwealth could receive the bounty provided for. Section 2 provided that any agricultural society formed under the act "within any county or counties in this Commonwealth," in which no incorporated society at that time existed, might, upon investing \$1,000, partake of the bounty. This section also contained the following provision: "*provided, always, that no agricultural society, hereafter formed as aforesaid, shall be entitled to the benefits of this act, unless the same be formed in a county, or in an association of*

counties, including a population of thirty thousand inhabitants." Section 6 of the same statute provides that the act shall not extend to agricultural societies formed in towns or for any circle of territory less than a county.

The next statute was St. 1821, c. 49, which contained a provision authorizing the trustees of the incorporated agricultural societies, and such as might thereafter be incorporated, to fix and define bounds and limits of sufficient extent for the erection of their cattle sheds and yards. It also provided for other details respecting the exhibitions which were to be held upon their grounds. It further provided for the appointment of officers who were to give efficiency to the rules and regulations for the preservation of good order on the occasion of public cattle shows and exhibitions.

Both of these statutes show clearly that the Legislature did not intend to pay a bounty to a society which did not own land and buildings or give exhibitions within the Commonwealth. Rev. Sts., c. 42, contains, in brief form, nearly all of the regulations set forth in the above-quoted acts, together with additional provisions relating to premiums, etc. All of these provisions were re-enacted in the General Statutes, c. 66, with some added requirements as to filing certificates and making annual returns to the secretary of the State Board of Agriculture. In this statute, also (§ 16), a time was prescribed when exhibitions by the different agricultural societies entitled to receive the bounty provided for in § 1 should be held.

St. 1866, c. 189, provided that no agricultural society not drawing a bounty from the State should hereafter be entitled to such bounty, in case the grounds and buildings for holding exhibitions of said society were within twelve miles of the grounds and buildings of any other society by law entitled to such bounty. It also provided for the election of a delegate to the State Board of Agriculture by such societies as published their transactions and made returns to the secretary of the State Board of Agriculture. These provisions are practically re-enacted in Pub. Sts., c. 114, except that the date for holding the exhibitions is regulated by a rule of the State Board, and not by the statutes.

Furthermore, the same chapter (Pub. Sts., c. 114) which, in § 1, regulates the bounty to be paid to such organizations, provides in § 9 that: "Every such society shall admit as members, upon equal terms, citizens of every town in the county in which it is located, and all premiums offered shall be subject to the competition of every citizen of such county."

Upon the consideration of all these statutes, I am clearly of the opinion that the New England Agricultural Society is not within the purview of the statute.

A similar question has been raised in respect to the Bay State Agricultural Society. I am informed that this organization is similar in its purposes to the New England Agricultural Society. For the reasons stated above, therefore, I am of opinion that this association is not entitled to bounties.

PAUPER LAW — SETTLEMENT — EFFECT OF RETROACTIVE STATUTE.

A settlement acquired prior to 1860, which by its existence prevented the acquisition of a settlement in the same place, comes within the exception contained in St. 1898, c. 425, § 2, and is not lost because the person acquiring such settlement died before the passage of the statute.

To the Super-
intendent of
State Adult
Poor.
1901
May 17.

Your letter of April 4 requires the opinion of the Attorney-General upon the settlement of a female pauper. The facts stated in the letter are as follows: —

The pauper was born in 1813, and became insane when twenty years of age, since which time she has been *non compos mentis*, and has been a public charge of the city of Cambridge since Aug. 6, 1879. She acquired a settlement through her father, who owned and occupied a freehold estate in Cambridge from 1811 to 1871, the date of his death, gaining thereby a settlement under the provisions of Pub. Sts., c. 83, § 1, cl. 4.

A pauper who is an idiot or insane, and therefore is not competent, though of age, to gain a settlement for himself, follows the settlement of his father. He is in the same situation as a minor child, whose settlement, derived from his father, changes with that of his father. *Taunton v. Middleborough*, 12 Met. 35, 37; *Upton v. Northbridge*, 15 Mass. 237.

In the present case the pauper, having been insane since 1833, could acquire no settlement of her own, and must depend entirely upon that derived from her father, who was settled in Cambridge by virtue of the ownership and occupancy of a freehold estate from 1811 to 1871.

St. 1898, c. 425, § 2, provides that Pub. Sts., c. 83, § 6, shall be amended so as to read: "All settlements not fully acquired subsequent to the first day of May in the year eighteen hundred and sixty are hereby defeated and declared to be lost, except where the existence of such settlement prevented a subsequent acquisition of settlement in the same place."

It is clear that while the father gained his settlement prior to 1860 (1811-1860), the existence of the settlement so gained prevented a subsequent acquisition of settlement in the same place (1860-1871). There is no question that if he had been living at the time of the passage of St. 1898, his settlement would not have been lost under § 2.

I see no reason why the death of the father subsequent to the period of time when his settlement would have been acquired, but for the existence of the previous settlement, affects the question. The situation had become complete when he died, and nothing in the statute of 1898, expressly or by implication, makes any such exception. In the case of *Adams v. Ipswich*, 116 Mass. 570, where the facts under a similar statute were in all respects identical, although the question was not directly passed upon, no suggestion was made either by counsel or by the court, that the death of a person whose settlement was defeated by a prior settlement was material to the determination of the question.

CO-OPERATIVE SAVINGS BANKS — DIRECTORS — PROXY VOTING.

The directors of a co-operative savings bank cannot legally vote by proxy.

Your letter of April 27, relating to the Pioneer Co-operative Bank and to the Guardian Co-operative Bank, and the votings of those corporations, appears to require no opinion of law except upon the question whether directors may vote by proxy.

To the Board
of Commis-
sioners of
Savings
Banks.
1901
May 27.

It is well settled that they cannot legally vote by proxy. *Vide, Cook on Stock and Stockholders*, § 713a; *In Re Portuguese, etc., Co.*, L. R. 42, C. D. 160; *Perry v. Tuskaloosa, etc., Co.*, 93 Ala. 364.

VIOLATION OF PHARMACY LAW — PLEA OF NOLO CONTENDERE
— CONVICTION.

A plea of nolo contendere, followed by a fine imposed by the court, is a conviction within the meaning of St. 1896, c. 397, § 9.

To the Board
of Registration
in Pharmacy.
1901
June 5.

Your letter of June 3 requires the opinion of the Attorney-General upon the following question: "Is a plea of *nolo contendere*, followed by a fine imposed by the court, a conviction within the meaning of § 9, c. 397, Acts of 1896?"

It is. *White v. Creamer*, 175 Mass. 567.

NEWBURYPORT BRIDGE — LEGAL TITLE — REPAIR AND MAINTENANCE.

The title to the bridge over the Merrimack River, between the city of Newburyport and the town of Salisbury, was vested, under the terms of St. 1867, c. 296, § 7, in the county of Essex, by virtue of the proclamation by the Governor, dated Aug. 22, 1868, declaring the bridge to be free.

Since the bridge has become a public highway, however, questions relating to its repair and maintenance, and the parties who shall contribute thereto, are wholly within the discretion of the Legislature, and are to be determined upon considerations in no way connected with the legal ownership of the property.

To the House
of Representatives.
1901
June 6.

I have the honor to acknowledge the receipt of a copy of an order adopted by the Honorable House of Representatives requiring the opinion of the Attorney-General upon the question whether the bridge over the Merrimack River between the city of Newburyport and the town of Salisbury is the property of the Commonwealth or the county of Essex.

So far as the history of the bridge is shown by the statutes of the Commonwealth, it is as follows: by St. 1826, c. 164, certain persons were made a corporation by the name of the Proprietors

of the Newburyport Bridge, and were authorized to construct a bridge over the Merrimack River between Newburyport and Salisbury. I assume that the bridge in question was constructed by the corporation so chartered. It was provided in the charter, by § 4, that after a period of forty years from the time when the bridge was opened for travel it should revert to and become the property of the Commonwealth. I have no information as to the time when the bridge was opened for travel, but I assume that it was forty years before the next act relating to the subject, which was in 1867.

In the year 1867, by c. 296 of the Acts of that year, the county commissioners were "authorized and empowered to lay out as and for highways" certain bridges across the Merrimack River, including the one in question. It was further provided in this act that the damages, if any, to be paid to the proprietors of the bridges specified in the act should be paid in the same manner as damages occasioned by the laying out of highways; that is to say, by the county. Section 6 contained the unusual provision that the several cities and towns in said county, or any of them, might contribute to the county towards the payment of damages that might be awarded to the proprietors of such bridges; apparently leaving the question of contribution, and the amount of the same, optional with the cities and towns.

The important section of this act, so far as relates to the question submitted, is § 7, the language of which is as follows: "Upon evidence satisfactory to the governor and council that any one of said bridges now or hereafter belonging to the Commonwealth has been laid out as a highway according to the provisions of this act, the governor shall by his proclamation declare such bridge free; and thereupon all the property of the Commonwealth in such bridge and in the appurtenances thereto, shall vest in said county and in said cities and towns contributing to the payment of damages in the laying out of such bridge as a highway."

It was the obvious purpose of the Legislature by this section to dispossess the Commonwealth of the legal title to the bridges enumerated by vesting the same in the county and in such cities and towns as might, under the provisions of the section above

quoted, voluntarily contribute to the payment of the damages awarded for taking the same. If no city or town contributed then the county became the sole owner. But whether such contribution was made by cities and towns or not, the Commonwealth was to become dispossessed, and either the county alone or the contributing cities and towns together with the county were to hold the title to the bridges taken.

Apparently no action was taken under this section; for in the next year (St. 1868, c. 309, § 8) the county commissioners were commanded within sixty days after the passage of the act to lay out as and for highways the same bridges which they were authorized and permitted to lay out by the statute of 1867. They were further required to lay out the bridges enumerated in the manner provided by law for the laying out of highways, and according to the provisions of the statute of 1867, above referred to, so far as the same were applicable. The statute of 1868 further required the commissioners to apportion the damages sustained by the proprietors of such bridges among such cities and towns as the commissioners should determine were benefited by the laying out, thus doing away with the voluntary contributions provided for by the act of the previous year.

The bridge in question was laid out as a highway under the provisions of this act. But none of the provisions of the statute of 1867 were repealed by the later statute, excepting those relating to voluntary contributions for damages by the cities and towns. In other respects the provisions of the statute of 1867 still remained in force, including § 7, which provided that upon the proclamation of the Governor that the bridge had become free, the property in it should vest in the county, and in such cities and towns as had contributed to the payment of damages. As the title to the property had reverted to the Commonwealth no damages were awarded, and, therefore, no contributions were assessed upon or received from any city or town. The proclamation by the Governor declaring the bridge free was issued Aug. 22, 1868; and, thereupon, under the terms of the statute, the title to the bridge vested and is in the county of Essex.

It may not be improper for me to add, although strictly it is

not within the scope of the question submitted, that the legal title to the bridge has no direct connection with the question of the expediency of the enactment of the bill in question. The bridge has become a public highway, and questions relating to its repair and maintenance, and of the parties who shall contribute thereto, are wholly within the discretion of the Legislature. It was deemed expedient by the Legislature of 1867 to vest the title to the bridge in the county, even though it does not appear that such title was desired. But, nevertheless, the question who shall maintain the bridge is to be determined upon considerations wholly disconnected with the matter of legal ownership of the property.

BOARD OF HARBOR AND LAND COMMISSIONERS — LAND COVERED
BY NAVIGABLE WATERS — CESSION TO UNITED STATES.

Land at a distance of 200 feet below low-water mark, which is covered by water to a depth of 8 feet at mean low water, is "land covered by navigable waters" within the meaning of Pub. Sta., c. 1, § 7, although structures of loose stones have been erected thereon, and title thereto may be conveyed to the United States by the Board of Harbor and Land Commissioners under such statute.

Your letter of June 4 states that "under the provisions of St. 1898, c. 441, and St. 1899, c. 155, the Board of Harbor and Land Commissioners has cut a channel between Lake Anthony at Cottage City and Vineyard Sound, about 5 feet deep and 100 feet wide on the bottom, and has protected the same by building two stone jetties on either side of the cut extending into the sound about 200 feet beyond the low-water mark, reaching a depth of about 8 feet at mean low water. . . . The United States Lighthouse Board is willing to maintain lights on the ends of the jetties. The ends of the jetties are built up (as are the entire jetties) by loose stones piled up, through the interstices of which the water readily flows."

To the Board
of Harbor and
Land Commis-
sioners.
1901
June 25.

The question submitted by your letter is whether the Board may convey the land upon which the ends of the jetties have been erected to the United States for the purpose of maintaining lights and lighthouses thereon, it being one of the provisions of

the U. S. Rev. Sts. that no lighthouse shall be erected on any site until "cession of jurisdiction over the same has been made to the United States."

The authority of your Board is to be found in Pub. Sts., c. 1, § 7, which provides: "The board of harbor and land commissioners, with the approval of the governor and council, may in the name and behalf of the commonwealth convey to the United States the title of the commonwealth to any tracts of land covered by navigable waters, and necessary for the purpose of erecting lighthouses, beacon lights, range lights, or other aids to navigation, or lightkeepers' dwellings, upon the application of any authorized agent or agents of the United States: *provided*, that such title shall revert to and revest in the commonwealth whenever such land ceases to be used for such purposes."

There can be no doubt that the circumstances of the case bring it within the provisions of this statute.

The jetties extend out 200 feet below low-water mark and reach to a depth of 8 feet at mean low water. They are built of loose stones, through the interstices of which the water readily flows. The soil upon which the jetties rest is, therefore, the property of the Commonwealth, and title to it may be conveyed by your Board to the United States under the statute quoted and subject to the conditions named therein.

CIVIL SERVICE — CHIEF SUPERINTENDENT — SUPERINTENDENT
OF CITY FARM AT LOWELL.

By the term "chief superintendent of a department," as used in Rule VII., Schedule B, Class 12, of the civil service rules, is intended an officer who has the oversight and charge of the whole of the business of that department, and acts for and represents the head of the department in every branch of its authority. The superintendent of the City Farm at Lowell is not such an official, and his election, in disregard of the rules of the Civil Service Commission, is, therefore, illegal.

To the Civil
Service Com-
missioners.
1901
June 27.

The charter of the city of Lowell (St. 1875, c. 173, § 29, as amended by St. 1894, c. 190) provides for a board of overseers of the poor, and that "they may appoint a secretary and super-

intendent, and such other subordinate officers as the ordinances of the city may require, and may define the duties of said officers." Acting under the authority of this statute the Board in January elected one Robert B. Saunders to the position of superintendent of the City Farm, displacing Albert Pindar, a veteran, who, until then, was lawfully in office as such superintendent. No requisition was made upon the Civil Service Commission, and there was no pretence that the rules of the commission were complied with, it being claimed or assumed that this office was not within those rules.

Rule VII., Schedule B, Class 12, enumerates as officers who must be appointed under the civil service rules "superintendents, assistant superintendents, deputies and persons, other than the chief superintendents of departments, performing any of the duties of a superintendent in the service of any city of the Commonwealth."

The office in question being that of a superintendent of the City Farm of Lowell is within this classification, unless it is excepted by the words "other than the chief superintendents of departments." I understand that it has been contended that the official in question is to be regarded as the chief superintendent of a department within the meaning of those words as used in this rule, and therefore exempt from the operation of the civil service rules.

But obviously the "chief superintendent of a department," as that term is used in the rule quoted, is more than a mere "superintendent," for the latter is within the scope of the rules, while the "chief superintendent of a department" is not within the rules. The fact, therefore, that an officer is a superintendent does not of itself bring him within the exception. By the term "chief superintendent of a department" must be intended an official who has the oversight and charge of the whole of the business of that department, with full power of direction and management. He must be one who acts for and represents the head of the department in every branch of its authority.

The superintendent of the City Farm is not such an official. While he may have, and probably does have, the entire charge

and superintendence of the City Farm, and the buildings and departments associated under it, he is, nevertheless, not the general agent of all the matters relating to the poor department, and the administration of the poor laws. The agents and representatives of the board are by law two, a superintendent and a secretary. The secretary, as I am informed, has charge, subject to the control of the board, of what is known as the out-door poor relief funds, and distributes aid to those who are not inmates of any of the institutions. On the other hand, the superintendent of the poor farm has charge of those institutions. The duties of these two officials are entirely separate. Neither of them can be said to be the chief superintendent of the poor department.

The official in question, therefore, not being the "chief superintendent" of the poor department, within the meaning of that expression as used in the civil service rules, is not exempt, and must be chosen in accordance with the provisions of those rules. It follows that the election of Saunders was illegal.

**REGISTERED PHARMACIST — CLERK — SIXTH-CLASS LICENSE —
BOARD OF REGISTRATION IN PHARMACY.**

The granting of a sixth-class license to a registered pharmacist who is acting as a clerk in a pharmacy does not constitute a violation of the pharmacy law requiring the Board of Registration in Pharmacy to investigate and notify the proper prosecuting officer, as provided in St. 1896, c. 397, § 21.

To the Board
of Registration
in Pharmacy.
1901
June 28.

Your letter of June 5 submits the following question: "Upon complaint being made to the board of Registration in Pharmacy that a license of the sixth class has been granted to a registered pharmacist acting as a clerk in a pharmacy, is such a condition a violation of the pharmacy law, and is it the duty of the Board of Registration in Pharmacy to investigate and notify the proper prosecuting officer, as provided in § 21, c. 397, Acts of 1896?"

There is no law against the granting of a license of the sixth class to a registered pharmacist acting as a clerk in a pharmacy. For aught that may appear in the granting of a license, the appli-

cant is proposing to carry on the business in his own name upon receiving his license.

The prohibition of the statute, so far as it concerns your Board, is against suffering or permitting by a registered pharmacist of the use of his name or his certificate of registration by others in the conduct of the business of pharmacy, when he himself is not the owner and actively engaged in such business.

It is certainly the duty of your Board to investigate any such improper use of his certificate by a registered pharmacist, and to notify the proper prosecuting officer of the fact if it be found to exist.

It may be that your Board has other things in mind in the question submitted. If so, I can only reply, generally, that it is the duty of your Board "to investigate all complaints of disregard, non-compliance with, or violation of, the provisions" of the chapter. I have quoted the language of the statute for I am unable to improve on it. If complaints relate to matters not connected with the statute in question, it is not your duty to make them, but you are at liberty to do it, as is any other good citizen. But whenever any provisions of the pharmacy statute are violated, it is certainly your duty to investigate the matter and report it to the prosecuting authorities.

**INSURANCE — INSURANCE BROKER — LICENSE — CLERK OR
OTHER EMPLOYEE OF BROKER.**

A salaried clerk or other employee of a duly licensed insurance broker, who is not himself so licensed, cannot lawfully do any of the acts forbidden to persons not licensed as insurance agents or brokers. He cannot, under pretence of being a clerk, act as solicitor or broker of insurance, excepting so far as such work is under the immediate direction of his employer and is incidentally a part of his work as clerk.

Your letter of April 12 requires the opinion of the Attorney-General upon the question whether one who is a salaried clerk or other employee of a duly licensed insurance broker can lawfully do any of the acts forbidden to persons not licensed as insurance agents or brokers.

To the Insurance Commissioner.
1901
June 28.

St. 1894, c. 522, § 87, provides as follows: "Any person not a duly licensed insurance broker, who solicits insurance on behalf of any insurance company, or transmits for a person other than himself an application for or a policy of insurance to or from such company, or offers or assumes to act in the negotiation of such insurance, shall be deemed an insurance agent within the intent of this act, and shall thereby become liable to all the duties, requisitions, liabilities and penalties to which an agent of such company is subject."

By § 98 of the same act it is provided that: "Any person who shall assume to act as an insurance agent or insurance broker without license therefor as herein provided . . . shall be punished by a fine of not less than one hundred nor more than five hundred dollars for each offence."

The certificate issued under § 91 of the same chapter is personal to the licensee, who must be found by the insurance commissioner to be a "suitable person." The licensee, therefore, may not delegate his authority to an unlicensed person, even though he be his clerk.

The distinction between what the employee may do and what he may not do is well stated in the opinion given to you, as you inform me by your letter, by a former attorney-general, to wit: "that any clerk or employee who acted outside of his employer's office in soliciting insurance, or doing the other things that constitute a person an agent of an insurance company, would not be protected by his employer's license; while a clerk, or employed person, doing the clerical work of an insurance office and waiting on the customers at the counter, advising as to rates, delivering policies and receiving pay therefor, and perhaps incidentally acting in the negotiation of insurance, would not need a license, inasmuch as he is acting as eye, ear, or hand of his employer, and is not known to the insured in any responsible capacity."

In other words, the employee cannot lawfully be a solicitor or broker of insurance, excepting so far as such work is under the immediate direction of his employer and is incidentally a part of his work as clerk.

MASSACHUSETTS HIGHWAY COMMISSION — STATE HIGHWAY —
NUISANCE — PUBLIC HEALTH.

The Massachusetts Highway Commission is not charged with any duties relating to the preservation of the public health, and therefore is not required to take any action toward abating a nuisance upon a State highway when such nuisance does not affect the conditions of the highway as a road structure.

Your letter of June 4 states that certain abutters along the State highway in Leicester are discharging their house sewage into the gutter of the State road, thereby creating a nuisance. The letter further states that the houses are very near the road, and so situated as to make it difficult to maintain a system of cesspools, and that the practice of discharging sewage into the gutter has been going on for a long time, both before and since the construction of the road by the Commonwealth.

To the
Massachusetts
Highway Com-
mission.
1901
June 28.

The letter requires the advice of the Attorney-General as to the duties of the Massachusetts Highway Commission upon this state of facts.

The duties of your commission as to State highways are to keep them in good repair and condition at the expense of the Commonwealth. I assume that the discharges complained of do not affect the condition of the highway as a road structure. Even if it were otherwise, it is not entirely clear how far a person can be compelled to prevent flowage of water from his premises to a highway. The present question, however, arises by reason of the claim that the discharges are injurious to the health of the public and thus constitute a nuisance. With this aspect of the matter your Board has nothing whatever to do. You are not charged with any duties looking to the preservation of the public health or the prevention of nuisances affecting the same.

CO-OPERATIVE BANKS — SECURITY — COLLECTION OF LOAN.

If upon the forfeiture of the shares and the foreclosure of a mortgage respectively pledged and executed by a stockholder in a co-operative bank, to secure a loan from such bank, the amount realized therefrom is not sufficient to discharge the loan, the balance remaining unpaid becomes a debt which is presently due and may be recovered by suit forthwith, like any other loan.

To the Board
of Savings
Banks Com-
missioners.
1901
July 6.

Your letter of February 25, 1901, encloses a copy of the form of note and mortgage usually taken by co-operative banks in this Commonwealth when advances are made by them upon shares of the bank, and requires the opinion of the Attorney-General as to "whether or not under said form of note and mortgage, in cases of foreclosure and sale, if the property did not bring sufficient to pay the amount advanced by the bank, would it have a claim on the maker of the note (as in cases of ordinary mortgages) for the deficiency between the sale and the amount of the advance?"

In order intelligently to answer this inquiry, it is necessary to ascertain the precise nature of the contract expressed by the note and mortgage, the forms of which are submitted with your letter. The form of the note (which is followed in the condition of the mortgage) is unusual. It is peculiar, I believe, to co-operative banks. Many borrowers, who understand clearly that the bank has loaned them money, secured by a mortgage, and payable in monthly instalments, find it difficult to comprehend the somewhat involved terms of the note they are required by the bank to sign.

The first difficulty grows out of the peculiar signification of the word "share" as used in the note and mortgage. It is unlike the ordinary share in a business corporation, in that the subscriber for a share merely acquires by his contract with the bank the right to continue to pay assessments on his so-called share until the assessments paid by him, together with the interest earned upon them, amounts to \$200, at which time that sum is forthwith paid to him. That is to say, the word "share" means only the right to contribute monthly to a given fund, to be used by the bank for the purpose of making loans; to be credited

with the amount of his contributions and the proportional part of the interest earned upon such contributions until the accumulation reaches the sum of \$200, when the whole amount is paid to the subscriber, and his so-called share is at an end.

Another peculiarity of co-operative bank transactions lies in the fact that there are no loans excepting to shareholders. The borrower must subscribe for a number of shares at \$200 each, sufficient to equal the amount of his proposed loan. That is to say, if he proposes to borrow \$1,000, he must subscribe for five shares of \$200 each. These shares are forthwith pledged by him to the bank for the amount of the advance. He undertakes to pay monthly the interest on the amount of the advance, and the dues and assessments appertaining to the shares. The contract of pledge is terminated (unless sooner by the voluntary act of the parties) when the accumulations of the shares make them worth the full amount of \$200. Then the shares of the borrower and his obligations are discharged at the same time; the value of the shares being equal to the amount of the advance made to him.

Obviously, however, a loan made upon shares which represent nothing but the right to contribute money is an insufficient security, unless there is some adequate assurance that the dues upon the shares will be paid, together with interest upon the advance. To secure these two things the form of note submitted with your letter has been devised. The contract of the note is, in substance, an agreement by the borrowing shareholder that he will pay the monthly dues on the shares, and the interest upon the loan, until the shares shall reach the ultimate value of \$200 each. The condition of the mortgage is practically the same. It is not the repayment of the advance, but the payment of the interest upon the advance and the dues upon the shares pledged as security for the advance.

It is provided by Pub. Sts., c. 117, § 16, as amended by St. 1882, c. 251, that if the borrowing member fails to comply with his contract to pay the dues upon his shares and interest upon his advance, the directors may at their discretion declare the shares forfeited. They shall thereupon charge the borrowing

member with the arrears of interest and dues upon the shares, and credit him upon his loan with the value of the shares; and may thereupon, after a stated time, enforce "the balance of the account" against the security. Under this provision of the statute, therefore, the mortgage may be foreclosed for the purpose of collecting this balance. The inquiry in your letter supposes the case that the mortgaged property may not sell under foreclosure for enough to pay the balance of the account, and requires the opinion of the Attorney-General upon what further rights the bank has upon the borrowing member.

Notwithstanding the elaborate provisions in the note and in the mortgage, by which the transaction is made to appear to be a subscription for shares by the borrower, and an advance upon the credit of them, with a mortgage to secure the balance unpaid upon the shareholder, it is obvious that the transaction is, nevertheless, in fact a loan, and these provisions are methods devised to permit the paying of the loan in small instalments, and under circumstances which, as it is claimed by those interested in co-operative banks, will allow the borrower in fact to get a lower rate of interest on account of the investment by the bank of his partial payments in other loans, in the profits of which he participates as a shareholder.

But if the consideration in relation to the pledge of the shares is broken, and the shares are forfeited, and the security of the mortgage is exhausted, and all these proceedings are not sufficient to pay the loan, it is not discharged, remains due, and may be collected by suit, like any other loan. The suit would not be upon the note, nor upon any contract relating to the shares. The declaration would be a common count for money loaned.

It is also obvious that when the shares are forfeited by the fault of the borrower, the balance is presently due and may be collected forthwith. There was no time fixed in the original loan for a repayment; but by subscribing for and pledging shares he acquired the right to discharge his loan by paying the assessments on his shares until the value of the shares equalled the amount of the loan. This right ceased when his shares were forfeited, and nothing of the transaction remained but a loan, without time fixed for repayment, and therefore due on demand.

INSURANCE — LIABILITY OF PHYSICIAN FOR ACCIDENT TO
PATIENT — ACCIDENT INSURANCE POLICY.

Injury or death caused by the mistake, inadvertence or error of a physician, is, so far as concerns the patient, an accident, and a policy issued to physicians insuring them against loss from common law or statutory liability for damage on account of bodily injuries, fatal or non-fatal, suffered by any person or persons in consequence of any alleged error or mistake made by the physician to whom such policy is issued, is insurance against loss or damage on account of "bodily injury or death by accident" within the meaning of cl. 5 of St. 1894, c. 522, § 29, and is therefore legal.

Acts of 1894, c. 522, § 29, par. 5, provides that insurance companies may be formed "to insure any person, firm or corporation against loss or damage on account of the bodily injury or death *by accident* of any person for which loss or damage said person, firm or corporation is responsible." Section 77 of the same chapter authorizes foreign companies under certain conditions to transact in this Commonwealth any class of insurance authorized by its laws. A foreign insurance company, which has been admitted to do an accident business in this State under the sections referred to, proposes to issue to physicians policies insuring them "against loss from common law or statutory liability for damage on account of bodily injuries, fatal or non-fatal, suffered by any person or persons in consequence of any alleged error or mistake made" by the physician to whom the policy is issued.

To the Insurance Commissioner.
1901
July 10.

The question submitted in your letter of June 12, 1901, is whether such a contract is within the authority of the statute above quoted.

It is settled that insurance may be written covering accidents to persons other than the assured. *Employers' Liability Insurance Company v. Merrill*, 155 Mass. 404. It has also been held that such a contract is not against public policy. *American Casualty Company's Case*, 82 Md. 535.

There is nothing, then, to make this form of insurance illegal, provided the statute is broad enough to authorize it. Whether this be so depends upon the interpretation to be given to the word "accident," as used in the statute.

In general, an accident may be said to be the operation of chance. As the word is more commonly used it signifies an undesirable or unfortunate happening, an undesigned harm or injury. In this broad sense any disease may be said to be an accident. But the word as used in the statute is to be construed in accordance with its surroundings. Throughout insurance statutes a distinction is made between death or injuries resulting from disease and those which are the result of what are ordinarily called casualties or accidents. Mere disease, therefore, is not an accident. An aggravation, however, of the disease, caused by no fault of the patient, but by a mistake, inadvertence or error of another, may properly be termed an accident, so far as the patient is concerned.

This may be so even though the patient himself can make no claim upon his own accident insurance policy. The ordinary accident insurance policies specifically except death or disability caused, wholly or in part, by surgical operations or medical treatment for disease. Most of them also further limit the use of the word "accident" by barring cases where there are not some external marks of injury.

Bearing these considerations in mind, I see no good reason to doubt that whenever a patient receives an injury, the proximate cause of which is the negligence of the physician, he may as properly be said to have been injured by accident, as an employee who is thrown to the ground by a staging defective in consequence of the negligence of his employer. The same is true, in my judgment, of fatal injuries caused under the same circumstances. If a man receives a wound, not of itself fatal, but which causes death by what is commonly called blood-poisoning, this would be death by accident. If a patient is treated by a physician who neglects to use antiseptic precautions, and death results from such neglect, it is still an accident so far as the patient is concerned, and one for which the physician may be liable.

An employer whose negligence causes injury to his employee may be held to pay damages therefor, either at common law or by some statute. He may insure himself against such liability. A physician whose negligence causes injury to his patient that

would not have happened to him if he had been skilful may be made to pay the damages which result. I see no difference between insuring the physician under such circumstances and the employer whose negligence made him liable to his employee.

It is not necessary to consider whether there may not be cases of liability by physicians for malpractice which could not be insured against under the statute quoted. It is sufficient that some cases where physicians are held liable at common law come within the meaning of the statute as I interpret it, and therefore that the form of policy cannot be pronounced illegal.

PAUPER LAWS — UNSETTLED WOMAN — RETROACTIVE STATUTE.

A female pauper, who, prior to 1860, acquired a derivative settlement through her husband, was not an "unsettled woman" within the retroactive provisions of St. 1874, c. 274, § 2, and St. 1878, c. 190, and so could not acquire a settlement thereunder in her own right, and therefore became, upon the passage of St. 1898, c. 425, § 2, cutting off her derivative settlement, an unsettled woman.

The pauper referred to in your letter of March 11 was born in 1819 and has been a widow since 1849. She acquired, prior to 1860, a derivative settlement, through her husband, in Salem. Since 1860 she has resided in Boston, but was aided at the expense of Salem in the years 1864–1866 inclusive and in the years 1875–1898 inclusive. During the years 1867–1874 inclusive she received no aid, being then a resident of the city of Boston. The question submitted by your letter is whether she is to-day settled in Boston.

To the Super-
intendent of
State Adult
Poor.
1901
July 30.

St. 1874, c. 274, provided in § 2 that a woman residing in any place within the State for five years, without receiving relief as a pauper, would gain a settlement in such place; but in § 3 it was provided that no existing settlement should be changed by the act, unless the entire residence accrued after its passage; but that as to unsettled persons the statute should be deemed to be retroactive. This act, therefore, did not give her a settlement in Boston, for she was not then an unsettled person, and the five years' residence in Boston was before the enactment of

the statute. This statute was re-enacted in St. 1878, c. 190, and was extended to married women who had no settlement derived by marriage, by St. 1879, c. 242. Both of these later statutes were retroactive as to unsettled women only. They did not operate, therefore, to change her derivative settlement in Salem.

The re-enactment of these provisions in Pub. Sts., c. 83, § 1, cl. 7, did not change the situation.

Up to the year 1898, therefore, the pauper had not acquired a settlement in Boston and had not lost her settlement in Salem. St. 1898, c. 425, § 2, however, provides that "all settlements not fully acquired subsequent to the first day of May in the year eighteen hundred and sixty are hereby defeated and declared to be lost, except where the existence of such settlement prevented a subsequent acquisition of settlement in the same place: *provided*, that whenever a settlement acquired by marriage has been thus defeated, the former settlement of the wife, if not defeated by the same provision, shall be thereby revived."

This statute cut off her derivative settlement in Salem, and as she would lose any settlement which she might have had before marriage by the same provision, and so far as the facts show was not prevented by her derivative settlement from gaining another in Salem, she became under its provision, and is to-day, an unsettled woman.

METROPOLITAN PARKS — VIOLATION OF LAW — FINES.

The provision of St. 1901, c. 464, requiring that all fines recovered for violation of the laws of the Commonwealth within the limits of lands, roadways or boulevards under the care of the Metropolitan Park Commission shall be accounted for and paid to the Treasurer of the Commonwealth, and by him placed to the credit of such commission, must be limited to fines actually collected or received by the commission.

To the Metro-
politan Park
Commission.
1901
August 6.

St. 1897, c. 121, § 2, provided as follows: "All sums of money hereafter collected or received by said commission, including sums received for rentals, sales, or use of property under its care, and all fines recovered for violations of law within the limits of the lands, roadways or boulevards under its care, shall be accounted for and paid to the treasurer and receiver-general of the

Commonwealth, and shall be placed by him to the credit of and added to the funds provided by law for meeting the expenses of said commission, and may be expended by said commission in addition to any loans or appropriations authorized for park purposes."

In an opinion given Sept. 15, 1898 (1 Op. Atty.-Gen. 595), I advised your Board that the phrase in the section, "all fines recovered for violations of law within the limits of the lands, roadways or boulevards" under the care of the Metropolitan Park Commission, should be construed as including only such fines as were recovered for violation of the rules and regulations made by the park commission.

St. 1901, c. 464, repeals the section above quoted and substitutes a new section therefor (§ 1). The new section is similar to the old in all respects excepting that in place of the phrase "all fines recovered for violations of law within the limits of the lands, roadways or boulevards under its care," the new section substitutes the following, to wit: "all fines recovered for violation of rules and regulations established by said commission for the government and use of the lands, roadways or boulevards under its care, or for violation of the laws of the Commonwealth within the limits of said lands, roadways or boulevards."

Having expressly added "fines recovered for violation of rules and regulations established by the commission" to "fines recovered for violations of law within the limits of the lands, roadways or boulevards," as provided in the repealed section, it was undoubtedly in the mind of the framers of the new statute that the latter expression (which stood alone in the old statute) could no longer be limited in its construction, as indicated in my former opinion, basing this view upon the proposition that the statute would be without meaning if two independent and connecting clauses referred to the same matter.

There is much force in the suggestion. Statutes are not to be construed as being without meaning unless there is no other possible alternative. But I am, nevertheless, of the opinion that the statute of 1901 cannot be construed according to the obvious intent of its framers.

In order to a full understanding of the questions involved, it is necessary to consider some general rules of pleading and practice in criminal law. An offence having no essential connection with the place in which it is committed need not be alleged in criminal pleading as having occurred at any particular place. There must be an allegation of place, but the indictment or complaint is supported if it be shown that the offence was committed within the county. *Commonwealth v. Heffron*, 102 Mass. 148; *Commonwealth v. Kern*, 147 Mass. 595. In framing an indictment for such offences, which comprise by far the greater number of those known to criminal pleading, it is unnecessary to specify the exact locality. By the well-settled rules of criminal pleading, it is sufficient to allege that the offence was committed in a town within the county.

Some offences, it is true, are local in their nature; but even as to them it is usually sufficient to name the town in which they were committed. Common nuisances and liquor nuisances are examples of this class of offences.

This being so, it is obviously impossible for the clerk, whose duty it is to transmit fines recovered, to know the locality in which the crime was committed. As to some, it is often impossible to designate a particular locality, like, for example, the offence of writing and publishing a libel. If the case is tried before the court and the clerk happens to be present, he may learn from the testimony the locality of the offence, but very many cases are disposed of by a plea of guilty, and there is no evidence presented to the court which would give the clerk the desired information.

I am unable to construe a law as intending an impossibility. Upon the construction claimed for the statute in question, it is the duty of the clerk to see that fines recovered for all violations of law committed on the parks and boulevards under the charge of your commission shall be designated as such, in order that they may be paid over in accordance with its terms. This the clerks cannot do; much less can the Treasurer of the Commonwealth, in the absence of information from the clerks of courts, know what fines received by him shall be paid over to the park fund, as required by the statute.

Moreover, the matter of the disposition of fines recovered in criminal proceedings has been the subject of many statutes, general and special. Formerly all fines, in the absence of any special provisions to the contrary, were paid over to the treasurer of the county. Pub. Sts., c. 154, § 34. Much dissatisfaction arose on account of this provision, it being claimed by town officers that in many cases they were required to spend the money of the town to detect and convict criminals without receiving any reimbursement, the fines imposed going to the county. St. 1891, c. 416, accordingly, provided that fines collected in the Superior Court should be paid to the treasurer of the county, while fines collected in an inferior court should be paid to the city or town in which the offence was committed. It was deemed that this somewhat arbitrary division would fairly adjust the balance between municipalities and the county in the matter of criminal expenses on the one hand and receipts from criminal cases on the other.

In addition to the general provisions referred to, there are numerous special statutes regulating the disposition of fines. For example, fines imposed for cruelty to animals shall, in certain cases, be paid to the Massachusetts Society for the Prevention of Cruelty to Animals. Pub. Sts., c. 207, § 58. Many statutes provide for the payment of the whole or a portion of fines recovered in certain cases to the informant. Fines imposed for non-support of a wife may, in the discretion of the court, be paid to the wife.

But under the construction claimed, this statute, which is entitled "An act to define the disposition of money received by the Metropolitan Park Commission from rentals and from other sources," contains in its first section a single clause repealing, in certain cases, all the general and special provisions of law above referred to. Clerks of courts, searching the statutes for enactments relating to the performance of their duties, would scarcely expect to find under the above title an act so important to them. I am unable to believe that the Legislature can be deemed to have intended to enact so important a change in existing statutes in this indirect and obscure way.

The only way in which the statute in my opinion can be construed is in accordance with its title. In terms it is entitled an

act relating to the disposition of moneys *received by the park commission*. Literally construed the section in question is limited to fines collected or received by the commission. Its provisions must be limited to such fines. The fact, if it be a fact, that under existing laws no fines are received by the park commission, renders the law useless. But even this result is preferable to a construction of its terms which would make it a statute impossible to be enforced.

CIVIL SERVICE — PERMANENT SERVICE — PROBATIONARY
PERIOD — DE FACTO OFFICIAL.

The retention in the civil service after his period of probation is over, without further appointment, of a certified candidate provisionally appointed, is not a violation of the civil service rules.

Such *de facto* official having been certified as fit by the Civil Service Commission, the requirements of the civil service law are satisfied.

To the Civil
Service Com-
missioners.
1901
September 27.

Your letter of July 24 requests the opinion of the Attorney-General upon the following facts: certain men were duly nominated and confirmed as members of the regular police force of Lawrence for the probationary period of six months. The civil service rules were complied with in their appointment. The probationary period has expired. At the end of that period the mayor nominated them for permanent officers, and the board of aldermen refused confirmation. They are still holding office, performing all the duties and receiving pay therefor. Upon these facts your letter requests my opinion upon the following inquiries:—

First.—If, at the expiration of the six months' probationary period, a police officer is not permanently appointed, does he cease to be such officer?

Second.—Upon the above statement of facts, are these appointees now legally acting as police officers in Lawrence?

I am of opinion that these questions do not concern your Board. The rules have been complied with in their original appointment. It is true that Rule 35 provides that at the end of six months the probationer shall be absolutely appointed or

employed, or otherwise shall be deemed out of the service; but the fact that the officers in question are continuing to act after the expiration of the probationary period, and without absolute appointment to the regular service, is one which concerns the city of Lawrence and not your commission. There is no violation of the civil service rules. They are acting as *de facto* officials, but, in my opinion, such action does not transgress any rule laid down by the commission. The men serving as such *de facto* officers had been certified by your Board as fit, and the requirements of the civil service law are satisfied.

**PUBLIC WEIGHING — PLATFORM WEIGHING MACHINE — SEALER
OF WEIGHTS AND MEASURES — CONTENTS OF MILK JARS.**

A platform weighing machine, publicly placed for the purpose of allowing a person to ascertain his weight upon the payment of a fee, is not used for the purposes of commercial transactions, and is not within the provisions of Pub. Sts., c. 65, requiring weights, measures or balances for the purpose of selling goods, wares, merchandise or other commodities, or for public weighing, to be adjusted and sealed.

A sealer of weights and measures of a city or town has no authority to seal a milk bottle of a size not prescribed by St. 1901, c. 360.

Your letter of August 27, 1901, requires the opinion of the Attorney-General upon two questions, the first of which is as follows:—

To the
Treasurer
and Receiver-
General.
1901
September 27.

First.— Do the provisions of c. 65, Public Statutes, or acts in amendment thereof or in addition thereto, apply in any way to a platform weighing scale publicly placed for the purpose of allowing a person to ascertain his weight, such weight being registered automatically only upon the payment of a fee?

The provisions of Pub. Sts., c. 65, entitled "Of weights and measures," and the acts in amendment thereof, are intended to secure honest dealing between buyer and seller by assuring to the purchaser the use of correct weights and measures by the seller. The machines referred to in your question are not used for the purposes of commercial transactions. They are, therefore, not within its provisions, and need not be sealed. It is scarcely neces-

sary to say that the expression "public weighing," in the chapter referred to, relates to the weighing by sworn officials appointed for that purpose of commodities which are bought and sold.

Second.—Is it lawful for a sealer of weights and measures of a city or town to seal a milk bottle holding a greater or less amount than the authorized variation prescribed by c. 360, Acts of 1901?

The chapter referred to (St. 1901, c. 360) was intended to authorize the use of glass bottles and jars of certain sizes for the distribution of milk and cream. The sizes so authorized are those containing quarts and divisions and multiples thereof. The statute does not authorize the sealing of jars or bottles of any other size. The duties of the sealer are prescribed by the statute, and he has no authority or discretion to seal any bottles or jars except those specified.

TREASURER OF THE COMMONWEALTH — MILLICENT LIBRARY CORPORATION — INVESTMENT OF FUND.

St. 1893, c. 392, providing that the Treasurer of the Commonwealth may receive and hold in trust the sum of \$100,000 for the benefit of the Millicent Library Corporation, for the purposes of a public library in Fairhaven, in § 3 authorizes the Treasurer to purchase long-time securities at a price above par, using so much of the income as is necessary to pay the premium, in order to keep intact the principal of such fund.

To the
Treasurer
and Receiver-
General.
1901
September 27.

By St. 1893, c. 392, the Treasurer of the Commonwealth was authorized to receive and hold in trust the sum of \$100,000 "for the benefit of the Millicent Library Corporation, for the purposes of a public library in Fairhaven." Investments of the fund are to be made under the direction of the secretary of the Board of Education and the Treasurer, — all such investments to be subject to the approval of the Governor and Council. The statute became operative during the current year by the payment of the money to the Treasurer.

Your letter of September 16 states that it is desirable that the fund be invested in long-time securities, — the purchase of which is only possible by the payment of a premium, — and requests the opinion of the Attorney-General upon the question whether the Treasurer is authorized to expend any part of the income of

the fund for the payment of a necessary premium to make possible the reinvestment of the fund in long-time securities at a par valuation. The first investment of the fund was in securities at par or less.

Section 3 of the act quoted provides as follows: “. . . The net income of the said fund shall be determined after deducting all necessary and proper expenses incurred in the administration of said fund, and after reserving such amount of the gross income as in the opinion of said commissioners is necessary to maintain the principal of said fund intact.”

This provision, in my judgment, authorizes you to purchase long-time securities at a price above par, using the income so far as necessary to pay the premium, so that only the par value shall be charged to the principal of the fund. There can be no other intelligent interpretation of its meaning.

INSURANCE — LICENSE AS INSURANCE AGENT — CORPORATION.

A corporation is not a “person” within the meaning of St. 1894, c. 522, § 93, cl. 2, as amended by St. 1895, c. 59, § 2, providing that, upon payment of a fee of ten dollars, the Insurance Commissioner may issue to any “suitable person” a license to act as insurance broker.

St. 1894, c. 522, § 93, cl. 2, provides as follows: “The insurance commissioner may, upon the payment of a fee of ten dollars, issue to any person a certificate of authority to act as an insurance broker to negotiate contracts of insurance or reinsurance or place risks or effect insurance or reinsurance with any qualified domestic insurance company or its agents, and with the authorized agents in the Commonwealth of any foreign insurance company duly admitted to do business in the Commonwealth.”

To the Insurance Commissioner.
1901
October 2.

By St. 1895, c. 59, § 2, the section above quoted was amended by inserting the word “suitable,” so that the commissioner was authorized to “issue to any suitable person” a license as insurance broker.

By St. 1896, c. 448, it was provided that such licenses should be limited to the residents of the Commonwealth, or to residents

of other States who granted like certificates to residents of this Commonwealth.

Notwithstanding the able and ingenious brief by the attorney for the corporation petitioning for a license as an insurance broker, I am of opinion that under this statute the Insurance Commissioner is not authorized to issue a license as an insurance broker to a corporation organized under the laws of the State of Maine doing business in this Commonwealth. There are many expressions throughout the insurance statutes which appear to me to show that the Legislature intended a personal license. Among the most conclusive is § 111, which provides that a licensed insurance broker who does certain things "shall be deemed guilty of simple larceny." If I understand the meaning of the word "larceny" it is not possible for a corporation, as such, to be guilty of that crime. Obviously, if this be so the Legislature had in mind natural persons only as licensed brokers.

I have not overlooked the fact that it was held by the Supreme Judicial Court in *Enterprise Brewing Co. v. Grimes*, 173 Mass. 252, that a corporation may be licensed to sell intoxicating liquor. The determination of that case, however, was based chiefly upon the provisions of the statute under which such licenses are granted, and the reasoning of the opinion does not apply to the statute now under consideration.

STATE HOUSE — ELEVATORS — LOCAL INSPECTION.

The elevators in the State House, so long as they are in charge of officers of the Commonwealth designated therefor by the Legislature, are not within the provision of St. 1901, c. 439, that certain construction work and devices therein required shall, in the city of Boston, be approved by the building commissioner.

To the
Sergeant-at-
Arms.
1901
November 6.

Under St. 1901, c. 439, amending St. 1894, c. 481, § 42, it is provided that all elevator cars "shall be provided with some suitable mechanical device whereby they will be securely held in the event of an accident to the shipper rope or hoisting machinery, or any similar accident." The statute contains other provisions

looking to the safety of elevator passengers. It further provides that the construction work and devices so provided for shall be approved in the city of Boston by the building commissioner.

Your letter of November 5 requires the opinion of the Attorney-General upon the question whether this statute is applicable to the elevators in the State House.

The State House is the property of the Commonwealth, in charge of officers authorized thereto by the Legislature of the Commonwealth. It is not to be presumed that police regulations of the character in question are intended to be applicable to officers of the Commonwealth or to the property of the Commonwealth; nor that the Legislature, by such enactments, intended to limit the authority of the Commonwealth over its own property, or to provide that a local officer should supervise the doings of its own servants. See 1 Op. Atty.-Gen. 290; 2 Op. Atty.-Gen. 56.

In my opinion, the elevators in the State House, so long as they are in charge of officers of the Commonwealth provided by the Legislature, are not within the provisions of the statute in question.

CITIZEN — UNNATURALIZED RESIDENT OF A CITY.

An unnaturalized alien, resident in a city of this Commonwealth, is not a "citizen" thereof.

The trustees of the Dickinson Hospital of Northampton have voted that the free benefits of the hospital shall be applied to those persons "who are citizens who have legal settlements in the towns of Northampton, Hatfield and Whately."

To the Superintendent of State Adult Poor.
1901
November 16.

A patient was admitted to the Dickinson Hospital who was of age, a native of Ireland, who came to the United States in June, 1900, and has lived in Northampton since. Your letter of October 18 requires the opinion of the Attorney-General upon the question whether he was within the provisions of the vote above quoted.

The person in question was not a citizen of Northampton and had no legal settlement therein. He was not even a citizen of the United States. A resident is not necessarily a citizen.

CIVIL SERVICE — CHIEF SUPERINTENDENT — SCHOOL-HOUSE
CUSTODIAN IN THE CITY OF BOSTON.

An officer with the title of "school-house custodian," appointed by the school committee of the city of Boston, whose duties are "the general supervision of janitors and the care of school property, excepting that which comes within the jurisdiction of the committee on supplies," is not a chief superintendent of any department, and is therefore within and subject to the civil service rules.

To the Civil
Service Com-
missioners.
1901
November 16.

Your letter of October 26 submits the question whether a person appointed by the school committee of the city of Boston to the position of school-house custodian is within the civil service rules.

It appears by a letter from the secretary of the school committee that the duties of the officer in question are "the general supervision of janitors and the care of school property, excepting that which comes within the jurisdiction of the committee on supplies." The authority of the school committee to choose such an officer is found in St. 1875, c. 241, § 4, authorizing the board to choose "such other subordinate officers as they may deem expedient," and to define their duties.

The officer in question is clearly within the civil service rules, — Rule VII., Schedule B, Class 12; to wit: "Superintendents, assistant superintendents, deputies and persons other than the chief superintendents of departments, performing any of the duties of superintendent in the service of any city of the Commonwealth." The officer in question is not a "chief superintendent" of any department within the construction of this rule adopted in the opinion of the Attorney-General dated June 27, 1901 (*Ante.*, p. 280), but is a person performing some of the duties of superintendent.

CIVIL SERVICE — PROVISIONAL APPOINTMENTS.

Where provisional appointments are made to fill the places of men appointed from the certified list furnished by the Civil Service Commission, and the persons so appointed are immediately suspended, such appointments are illegal.

To the Civil
Service Com-
missioners.
1901
November 16.

Your letter of October 8 requires the opinion of the Attorney-General upon the question whether the action of the superintendent of streets of Boston in appointing certain persons, in

April of this year, to be inspectors of paving of the city of Boston, was legal.

The facts as stated in your letter were that after making requisition upon the commission for twenty names of persons to be appointed to the position in question, and receiving a list of twenty, from which list it was his duty to appoint twelve, he purported to comply with the rules of the commission by appointing the required number, immediately suspending them and proceeding to fill the vacancies by provisional appointments.

There can be no doubt that such action was illegal. It was a mere device to evade the law, and the provisional appointments so made were illegal.

TRADE-MARK — FILING AND RECORDING — IDENTICAL TRADE-MARKS.

It is the duty of the Secretary of the Commonwealth, under St. 1895, c. 462, § 1, to refuse to receive or record a label which has already been recorded, notwithstanding the fact that the class of goods dealt in may be wholly dissimilar to the merchandise specified in the former application.

The expression "The Klondike" has been duly recorded, by a person carrying on business in this Commonwealth, as a label. In his certificate he specifies as follows: "General class, wearing apparel; particular description, suspenders."

To the
Secretary.
1901
December 5.

Since the filing of this label, application has been made for the recording of the same term as a label by a person who declares that he intends to appropriate it to overcoats.

The question submitted is whether it is your duty to receive and file the latter application.

I am of opinion that the words of the statute are so far controlling as to forbid you to receive and record a label which has already been filed and recorded, notwithstanding the fact that the class of goods dealt in may be wholly dissimilar to the merchandise specified in the former application.

St. 1895, c. 462, § 1, as amended by St. 1899, c. 359, § 1, permits the adoption of a label "not previously owned or adopted by any other person," and the latter part of the same section provides that the Secretary shall not record any label that would

reasonably be mistaken for a label already on record. If these provisions be literally construed, the second applicant is not entitled to have his label recorded.

I am aware that § 1 above quoted provides that the certificate of the applicant shall specify not only his class of business, but also "the class of merchandise and the particular description of goods comprised in such class to which" the label has been or is intended to be appropriated. If this provision stood alone, it might reasonably be argued that the applicant would be entitled to use his label exclusively only for the particular class of goods named in the certificate.

But in view of the express provisions of the statute above quoted, I think that the provision requiring a specification of the class of business and the particular goods in the class must be intended as an identification and method of proof as to the use of the label rather than as a limitation upon the ownership of it. If, for example, one should register a label without specifying upon what goods he had used or intended to use it, it might be difficult to determine whether his allegation of previous use were true. This construction reconciles the whole section and simplifies your duties.

It follows that having ascertained that the label now claimed has already been recorded, it is your duty to refuse to act upon the later application. See 1 Op. Atty.-Gen. 100.

STATE PAUPERS — AID FURNISHED BY CITIES AND TOWNS — RENDERING OF BILL — NOTICE.

The rendering to the Commonwealth of a bill for aid furnished by a city or town to a State pauper, as required by Pub. Sts., c. 86, § 43, does not terminate the liability of the Commonwealth to make reimbursement therefor so as to require a new notice from such city or town if the aid is thereafter continued.

To the Super-
intendent of
State Adult
Poor.
1901
December 23.

St. 1898, c. 425, § 5, amending Pub. Sts., c. 84, § 18, provides as follows: "A city or town may furnish aid to poor persons found therein, having no lawful settlement within the state, if the overseers of the poor deem it for the public interest; but except

in case of sickness, not for a greater amount than two dollars a week for each family during the months of May to September inclusive, or three dollars a week for the months of October to April inclusive, and the overseers shall in every such case give immediate notice by mail to the state board of lunacy and charity, which board shall examine the case, and should they direct discontinuance shall remove such persons to the state almshouse or to any state or place where they belong, when the necessities of such persons or the public interest require such removal."

This section is in harmony with the general policy of legislation in Massachusetts in the matter of public aid to persons in distressed circumstances, which aims to secure immediate relief, leaving the question of liability to be thereafterwards determined. It further exemplifies another well-established principle in the pauper legislation, which is, that persons in distress shall not be removed to public almshouses until it clearly appears that such removal is necessary. It is the duty of municipal authorities, both under this and under other statutes, to render aid at once. When the person so relieved is unsettled, notice of such aid is to be given forthwith to the Commonwealth, in order that the charge may be properly made to the State, and the question of removal is left to the decision of the State Board; and the liability of the State to the municipal authorities continues under the statute until the person is no longer in need of assistance or until the State causes the person so relieved to be taken to one of its almshouses.

In the case submitted by your letter of August 8, a poor person was first assisted by the authorities of the town December 22, 1900; notice was forthwith given to the Commonwealth; no removal was ordered by the State Board, and the assistance was continued until January 15, 1901; and the bill for assistance during that time has been rendered to the State by the town authorities.

It would be clear, but for one circumstance which will be hereafter considered, that under these circumstances due notice having been received by the State, and no action looking to the

removal of the pauper having been taken, the State would be liable for the entire bill. The question is raised, however, by your letter, whether the State is liable after December 31, 1900, no new notice having been given by the town after that date.

Whatever doubts exist upon the liability of the State arise upon the consideration of Pub. Sts., c. 86, § 43, which provides as follows: "All accounts against the commonwealth for allowance to counties, cities and towns, on account of state paupers, shall be rendered to the state board on or before the third Wednesday of January annually; and shall be so made as to include all claims for such charges up to the first day of said January, and, if approved by the board and certified by the auditor of accounts, shall be paid from the treasury of the commonwealth."

It is suggested that if a bill be rendered by the town, including all charges up to December 31, in compliance with this statute, such a bill is presumed to be the closing of the account, and, consequently, the termination by the town of temporary assistance, so that if such assistance be continued beyond that period a new notice to the State is necessary.

I am unable to appreciate the force of this contention. It may be conceded that under ordinary circumstances the rendering of a bill on behalf of the municipality is by implication a notice that the assistance by the town has terminated, so that if the town be called upon again to furnish assistance a new notice is necessary. But a bill rendered in obedience to the statute last quoted carries with it no such inference. The purpose of the statute obviously is to enable the Treasurer to make up a financial statement of the accounts of the Commonwealth for the year, so that all outstanding liabilities up to that time may be known; and the rendering of a bill in compliance with this statute cannot be taken to have any further significance. It is merely a statement that up to that date the State is indebted to the town to the amount stated, and nothing more. If, by way of illustration, a State required bills to be rendered monthly, it would hardly be contended that compliance with such a statute would make it necessary that a new contract of liability should be made after the rendering of the monthly bill.

No unexpected liability can be said to devolve upon the Commonwealth by the failure of the town to give a new notice after the end of the year. After the original notice is given, the authorities of the Commonwealth are presumed to be fully informed of the circumstances of the case, and of the condition of the pauper; and if they have determined not to remove the person assisted, it is for the reason that they deem it expedient to allow him to remain in the place where he is assisted. The mere fact of a bill being rendered because of a statute requirement to that effect does not change the situation and cannot operate to discharge the Commonwealth of its responsibility for the pauper.

I am of opinion, therefore, that the Commonwealth continues liable, notwithstanding the rendering of the bill required by Pub. Sts., c. 86, § 43.

The same considerations apply to a case arising under what is commonly called the Sick State Poor Law.

GREAT PONDS — TITLE TO ISLANDS — BOARD OF HARBOR AND LAND COMMISSIONERS.

The title to islands within the area of great ponds is, in the absence of any grant from the Legislature, or from the freemen of a town, prior to 1647, in the Commonwealth, and the duties of the Board of Harbor and Land Commissioners relating to such islands are prescribed by Revised Laws, c. 96, § 3.

Your letter of October 8 states that the Board of Harbor and Land Commissioners desires to be informed "whether or not islands in great ponds to which no private individual has title are property of the Commonwealth, with reference to the possession of which this Board has a duty to perform."

To the Board
of Harbor and
Land Commis-
sioners.
1903
January 7.

The term "great pond" has been used in the statutes of the Commonwealth from time immemorial. It originally signified an inland body of water consisting of ten acres (Colony Ordinance of 1647); but this area was subsequently increased, in the case of the public right of fishing, to twenty acres (St. 1869, c. 384, § 7).

The original grants from the king, in the case of the Colony of Plymouth and the Colony of Massachusetts Bay as well, gave to the colony the title to all lands within the Commonwealth, including great ponds. This provision was also incorporated into the charter of the Province of Massachusetts Bay, and the title to such lands and ponds, unless previously parted with, was, both before and after the Revolution, in the State. "These charters [the several charters to the colonies and the Province] vested in the grantees not only the right of soil, but also large powers of government and the prerogatives of the crown in the seashores, bays, inlets, rivers and other property which were held for the use and benefit of all the subjects." *Watuppa Reservoir Co. v. Fall River*, 147 Mass. 548, 554. See also *Commonwealth v. Roxbury*, 9 Gray, 451, 483; *Commonwealth v. Alger*, 7 Cush. 53.

From a very early period the law of Massachusetts has treated great ponds as of a character closely resembling tide waters, the enjoyment of which for fishing, fowling and other purposes was common to all, and the title in and lands under which could not be made the subject of private ownership without special grant from the Legislature. *Paine v. Woods*, 108 Mass. 160; *Ancient Charters*, 148, 149. See also *Commonwealth v. Vincent*, 108 Mass. 441; *West Roxbury v. Stoddard*, 7 Allen, 158. Thus it was provided in the Colony Ordinance of 1641 that every inhabitant should have free fishing and fowling in any great ponds . . . within the precincts of the town where they dwelt, unless the freemen of the town or the general court had provided otherwise. *Body of Liberties*, 1641. Later, it was provided that no town should appropriate to any person or persons any great pond containing more than ten acres. Ordinance of 1647.

These ordinances applied to all great ponds exceeding ten acres in area which in 1647 had not been appropriated to particular persons, either by the freemen of the town or by the General Court. *West Roxbury v. Stoddard*, *supra*. The Commonwealth therefore owns the great ponds as public property held in trust for public purposes. It has the ownership of the soil, including, obviously, the soil of islands within the area of such ponds, and

also the right to control and regulate the public uses to which the ponds shall be applied. *Watuppa Reservoir Co. v. Fall River*, 147 Mass. 557. In such ponds a grant bounded by the pond extends only to low-water mark. *Waterman v. Johnson*, 13 Pick. 261, 265; *Paine v. Woods*, 108 Mass. 160. The proprietors of land bordering upon the ponds have no rights in the soil or in the waters, unless it be by grant from the Legislature. *Watuppa Reservoir Co. v. Fall River*, 147 Mass. 557.

It follows that the title to lands in great ponds is, in the absence of any grant from the Legislature or from the freemen of a town, prior to 1647, in the Commonwealth. Being lands the title to which is in the Commonwealth, the duties of your Board relating to the same are prescribed by Revised Laws, c. 96, § 3.

EMPLOYEE OF COMMONWEALTH — SALARY — ADDITIONAL COMPENSATION.

An employee of the Commonwealth, who receives a salary from the State treasury, cannot legally receive additional compensation for work performed during the hours of employment for which such salary is paid.

The opinion of the Attorney-General is desired upon the following state of facts: a clerk in the boiler inspection department of your office receives a salary of \$600 a year from the State treasury, "said sum to be paid out of the proceeds of the fees received from examinations of applicants for licenses as engineers and for inspection of boilers." St. 1898, c. 219. She has also been employed by you for clerical work in connection with the sale of forfeited liquors, for which she receives compensation at the rate of \$33 per month. This work is done during the regular hours of business, that is to say, during the time for which she is supposed to be compensated by the salary of \$600 a year. The question submitted is, whether she may lawfully be so employed.

I am not troubled by the provision in the Revised Laws, c. 18, § 11, that "a person shall not at the same time receive more than one salary from the treasury of the Commonwealth." The undoubted intention of that statute was to prevent a person from

To the Chief
of the Massa-
chusetts
District Police.
1902
January 7.

being employed in two positions at the same time, receiving salary from each one. It does not prevent the payment of compensation for extra services not rendered during the usual hours of employment in the position for which the person is employed. It has been the immemorial practice in the State House to permit the employment of those receiving salaries, during extra hours and for extra compensation. This, of course, would not apply to general State officers, but only to clerks whose contract ordinarily is for services during regular office hours. Moreover, although the compensation paid in this case is deducted from the amount eventually paid into the State treasury, the compensation paid to the clerk in question is not paid "from the treasury of the Commonwealth," as provided in the statute.

But, upon another ground, I am of opinion that the employment is unauthorized. The salary paid is for certain hours of work each business day. Revised Laws, c. 6, § 58, provides that "salaries payable from the treasury shall, unless otherwise provided, be paid on the first day of each month, and shall be in full for all services rendered to the Commonwealth by the persons to whom they are paid." This section is to be construed as meaning that the salary shall be in full for all the services rendered in the position for which the person receiving the salary is employed, and does not prohibit paying compensation for extra services having no connection with the duties of that position. It is, however, inconsistent with the employment of a person in two capacities during the time when the person so employed is presumed to be engaged in the discharge of the duties of the office for which the salary was paid.

For this reason I am of opinion that the person in question cannot be paid for services rendered during the time for which she is employed under the salary payable from the State treasury.

GAS COMPANY — NEW ENGLAND GAS AND COKE COMPANY —
UNINCORPORATED ASSOCIATION — MANUFACTURE OF GAS
— RETURNS TO GAS AND ELECTRIC LIGHT COMMISSIONERS.

The New England Gas and Coke Company, an unincorporated association of individuals, engaged in the manufacture and sale of gas to certain corporations for the purpose of sale and distribution to the public by the latter, is not itself engaged in the business of the sale and distribution of gas to consumers, and therefore is not subject to the jurisdiction of the Gas and Electric Light Commissioners in the matter of the returns prescribed by Revised Laws, c. 121.

In a letter to you dated January 26, 1899,¹ I had the honor to advise your Board that in my opinion it had no jurisdiction to require the New England Gas and Coke Company to make the annual returns to the Board required by the statutes of gas companies, or to furnish information touching the condition, management and operation of the company. This opinion was based upon the facts then submitted by your Board, to wit, that the company in question was not a corporation, but only an association of individuals, and that it was not then engaged in the manufacture of gas.

To the Board
of Gas and
Electric Light
Commis-
sioners.
1902
January 7.

It now appears, however, that the company has installed a plant, and is engaged, and during the past year has been engaged, in the manufacture and sale of gas; but it further appears that its entire product is sold and delivered on its premises to the Massachusetts Pipe Line Company, which in turn sells and delivers the gas so received to companies in the city of Boston engaged in the sale and distribution of gas to consumers. The opinion of the Attorney-General is required, upon this state of facts, as to the liability of the company under the provisions of the statutes relating to gas and electric light companies, Revised Laws, c. 121. Certain of the provisions of that chapter are by § 41 made applicable to "all persons owning or operating works for the manufacture and sale of gas for heating or illuminating purposes within the Commonwealth." Although the business of the company in question is to not sell its product directly for heating or illuminating purposes, but to a corporation for the purpose of sale and distribution by that corporation for those

¹ *Ante*, p. 8.

purposes, and is therefore not strictly within the terms of § 41, yet, for the purposes of this opinion, I assume that the language of the section is broad enough to include the individuals composing the company in question. They are an association of individuals not forming a corporation, engaged in the manufacture and sale of gas intended to be used for heating or illuminating purposes; and, if the statute is to be taken literally, they are bound to make returns to your Board, to permit inspection of their books, to furnish information as to the conduct of their business, and are subject to the orders of the Board as to the quality of gas furnished by them and as to the price to be charged by them therefor.

Upon the facts submitted, however, I am of opinion that they are not within the scope of the statutes. I am led to this conclusion by a consideration of the purpose and justification of the statutes of the Commonwealth relating to the subject.

I do not deem it necessary to rest the justification for the regulations exercised by your Board over gas companies upon the proposition that they derive their authority from the Commonwealth, and are therefore under its control as to the conduct of their business. Speaking for myself, I see no reason why a corporation, whose charter is expressly made subject to all provisions of general laws, does not thereby contract that it will be governed by such provisions, at whatever cost to itself. I am aware, however, that the weight of authority is that regulation by the State must stop short of anything approaching that which may result in partial or total confiscation of its property, even though such confiscation be, by implication, within the powers conferred by the statutes to which, under its charter, it is made subject.

But there is another principle of law which amply sustains the authority of the Legislature to make the regulations contained in the statutes relating to gas and electric light corporations. Under our frame of free government, the Legislature has rarely attempted to regulate or in any way to interfere with the business of the individual, or to restrain or in any way to regulate the conduct of his affairs. This principle extends in general to corporations which have no special relations with the public.

But there is a class of corporations, sometimes termed "quasi-public," but which are more accurately termed "public-service" corporations, as to which the Legislature has undertaken to regulate their business, so far as such business relates to the public. Among these are corporations operating steam or electric railways, those engaged in telegraph or telephone business, and corporations carrying on the business of selling and distributing gas and electricity for heating and illuminating purposes. It is not accurate to say of such that they serve the public. In a general way a grocer may be said to serve the public, because he sells to all who come to his store. But he may discriminate, and may refuse to sell only to such as he chooses. The public-service corporations, on the contrary, undertake to serve all members of the community who have occasion to avail themselves thereof. In this respect they are analogous to innkeepers and common carriers, whose business from time immemorial has been subject to statutory regulation.

But the relations of public-service corporations to the public are closer even than those of common carriers and innkeepers, for the reason that the former enjoy franchises in public ways which could not lawfully be granted to private individuals, or have the right to take land of private individuals by condemnation proceedings for the purposes of their business. By reason of these rights they enjoy a practical monopoly, either in fact or by law, of the business in which they are engaged. In consideration of these rights, they must undertake to serve the public indiscriminately.

I am aware that in the case of *Commonwealth v. Lowell Gas Light Company*, 12 Allen, 75, there is a *dictum* of Chief Justice Bigelow, as follows: "They [gas companies] are not bound to sell and dispose of it [their product] to any one either for public or private use or consumption." This statement, however, has not been followed in later decisions, and in the case of *Evans v. Boston Heating Company*, 157 Mass. 37, and in the *Opinion of the Justices*, 155 Mass. 598, the soundness of this *dictum* is by implication questioned; and it may be doubted whether, if the question were presented directly, the court would not now hold

that a gas company in the enjoyment of public rights could not refuse to sell its product to any member of the community complying with its reasonable regulations. But, however that may be, all doubts as to the duties of gas companies are settled by the statutes. Revised Laws, c. 121, gives such companies, by § 26, a practical monopoly of the streets occupied by them for the purposes of their business; and § 33 authorizes your Board to compel them to furnish their product to any person or corporation applying therefor.

Being thus in the service of the public, and in the enjoyment of a legal or actual monopoly, there can be no doubt of the right of the Legislature to enact regulations for the protection of the customer. There are many such regulations. Among other things, your Board may prescribe how their books and accounts shall be kept (§ 29); it may require a gas company to supply its product to a resident of the city within which it is located (§ 33); it may make such regulations as it deems proper with relation to the quality or price of gas furnished (§ 34), and every gas company must furnish to the Board a sworn statement, with such details as the Board may require, of its indebtedness and financial condition, the amount of its dividends, the names of its salaried officers and the amount of salary paid to each (§ 31). It may also at any time investigate the affairs of a gas company, examine its books and inquire into the conduct of its business. Such regulations would be intolerable as applied to a private individual carrying on business not connected with the public, but they are amply justified upon the considerations stated.

For the same reasons, individuals who enjoy public rights and undertake to carry on the business of selling and distributing to consumers are properly made subject to the same regulations.

But when there is no possible relation between the gas manufacturer and the public, the justification for the regulation so imposed is entirely wanting. Whether it was the purpose of the Legislature to make the regulations imposed applicable to all incorporated gas companies, whether actually engaged in the business of manufacturing and selling gas, it is unnecessary to determine. But it is not to be presumed, unless the intention be clearly expressed, that it was the purpose of the Legislature

to impose upon an individual enjoying no public rights, and having no relations with the public, a supervision so extraordinary and minute. The company in question has no rights in public highways; it makes no contracts and fixes no price with consumers. There is no more occasion for supervision of their doings, in my judgment, than there would be in supervising the condition and operation of a coal company which supplies to a gas company the material for producing its gas. The purposes for the enactment of the statute entirely fail, and, while there is no express exception, it is, nevertheless, in my opinion, a reasonable construction of the law to hold that it was not intended to cover a case like the present.

It may be contended that this construction of the law operates to prevent your Board from ascertaining the cost of the gas furnished to the citizens of Boston by the companies distributing it. Even if this objection were well taken, it is one which is to be dealt with by the Legislature. But I see no such difficulty. It is to be presumed that the commission is able to ascertain, either upon its own knowledge or by the evidence of suitable experts, what the gas furnished by the Boston companies ought to cost, and to regulate the price accordingly. If the gas company has made an improvident bargain with the New England Gas and Coke Company, that is a matter which does not concern your Board, and they must suffer the loss if the reasonable price of gas be fixed by the Board at such a rate as makes it a losing contract. In other words, if they are incorporated for the purpose of manufacturing gas, they must sell gas at what it ought to cost them to manufacture it, *plus* a reasonable profit. If they see fit to employ another person or association of persons to make their gas for them, your duty is not altered thereby. It is not to investigate the business of the contractor, but to regulate the price of the gas supplied by the distributing company, regardless of their private contract with the manufacturer.

I am of opinion, therefore, that the association of individuals known as the New England Gas and Coke Company, not being engaged in the business of the sale and distribution of gas to consumers, is not subject to the jurisdiction of your Board.

OPINIONS

OF

HERBERT PARKER, ATTORNEY-GENERAL.

TOWNS — PUBLIC LIBRARY — SUPPORT.

A library, situated in a town, to which the inhabitants thereof have free access, and of which they have the use, although it is not owned or controlled by the town, is a public library within the meaning of R. L., c. 102, § 163, which provides that money received from the issuance of dog licenses shall be returned to cities and towns to be expended for the support of public libraries or schools.

To the Free
Public Library
Commission.
1902
January 18.

Your letter of January 16 requests the opinion of the Attorney-General upon the question whether a town may lawfully appropriate money received from dog licenses to the support and maintenance of any library to which the inhabitants have free access and of which they have the use, although such library is not owned and controlled by the town.

R. L., c. 102, § 163, provides that money received under the provisions relating to dogs shall be paid back to the treasurers of the cities and towns, "and the money so refunded shall be expended for the support of public libraries or schools;" R. L., c. 25 § 15, provides that a town may appropriate money for the following purposes, among others: "For the establishment, maintenance or increase of a public library therein, and for the erection or provision of suitable buildings or rooms therefor;" and "For maintaining a library therein, to which the inhabitants have free access and of which they have the use, and for establishing and maintaining a public reading-room in connection with and under the control of the managers of such library."

The question is, whether a library not owned and controlled by the town, yet open to the free access and use of the inhabit-

ants of the town, is a public library within the meaning of c. 102, § 163. The apparent argument against including such a library within the phrase "public library" is that in c. 25, § 15, above quoted, the Legislature seems to make a distinction between such library and a public library, by providing, in separate paragraphs, for their maintenance. I am of opinion, however, that no such distinction was intended, and that, whether a library is owned by the town or not, dog license money may be appropriated to it so long as the inhabitants of the town have free access to it.

TRUST COMPANY—PLACE OF BUSINESS—BRANCH OFFICE.

A trust company may legally receive or disburse money at a place other than its main office; and, subject to the provisions of R. L., c. 116, § 35, may purchase and hold real estate for the purpose of maintaining a branch office.

The first question submitted by your letter is, whether a trust company, subject to the provisions of R. L., c. 116, may receive or pay out money at any place other than at its main office.

To the Board
of Savings
Banks Com-
missioners.
1902
January 20.

Receiving deposits and paying checks at a branch office is incidental to the business of a trust company, and may be done unless prohibited by statute. R. L., c. 116 (the act relating to trust companies), contains no such prohibition. The act relating to banks and banking (R. L., c. 115), however, provides as follows: "Section 30. A bank shall carry on, at its banking house only, the usual business of banking, and no loan or discount shall be made, nor shall a bill or note be issued by such bank, or by any person on its account, in any other place than at its banking house." There is a similar prohibition in the law regulating savings banks (R. L., c. 113, § 20) and co-operative banks (R. L., c. 114, § 27).

Since our statutes have made this distinction between trust companies and other banking institutions, I am of opinion that your question must be answered in the affirmative. See *Nash v. Brown*, 165 Mass. 384.

Your second inquiry is as follows: "Can such company, hiring and occupying offices for its general business, purchase and hold

other real estate in the same city for an office in which to receive and pay out money?" This question is answered by R. L., c. 116, § 35, which is as follows: "Such corporation may hold real estate unencumbered by mortgage suitable for the transaction of its business to an amount including the cost of alterations and additions in the nature of permanent fixtures, not exceeding twenty-five per cent of its capital actually paid in, and in no case to exceed two hundred and fifty thousand dollars; but the provisions of this section shall not require such corporation to change an investment legally made prior to the eighteenth day of April in the year eighteen hundred and ninety-four."

REGISTERED PHARMACIST — EXAMINATION — INABILITY OF CANDIDATE TO UNDERSTAND THE ENGLISH LANGUAGE.

A person who presents himself as a candidate for examination for registration as a pharmacist is not necessarily debarred therefrom because he is unable to speak, read or write the English language.

To the Board
of Registration
in Pharmacy.
1902
January 22.

Your letter requires the opinion of the Attorney-General upon the question whether your Board is required by law to examine an applicant for registration who is unable to speak, read or write the English language.

The statute defining your duty is R. L., c. 76, § 14: "A person who desires to do business as a pharmacist shall, upon payment of five dollars, be entitled to examination, and if found qualified shall be registered as a pharmacist and shall receive a certificate signed by the president and secretary of said board."

I am aware of no provision of law which denies to any person the right to enter upon legitimate fields of labor or enterprise for the sole reason that he is unacquainted with the English language. Whether such a person is qualified to be registered as a pharmacist is a question for your Board alone.

PAUPER — SETTLEMENT.

A widow, owning and occupying an estate of inheritance or freehold for three consecutive years, may thereby acquire a settlement, in accordance with the provisions of R. L., c. 80, § 1, cl. 4.

Under the provisions of R. L., c. 80, § 1, cl. 5, not only the assessment of the taxes specified therein but also the payment thereof must be made within a period of five consecutive years.

Your letter of January 18 requests the opinion of the Attorney-General upon the following questions:—

To the Superintendent of
State Adult
Poor.
1902
January 22.

1. "Can a widow obtain a settlement in a town by ownership and occupancy of real estate for three years under R. L., c. 80, § 1, cl. 4?"

This clause provides that a person of the age of twenty-one years, who has an estate of inheritance or freehold in any place within the Commonwealth, and lives thereon three consecutive years, shall thereby acquire a settlement in such place. I am of the opinion that under this statute a widow may obtain a settlement by fulfilling the requirements therein set forth. *Orleans v. Chatham*, 2 Pick. 29. See *Spencer v. Leicester*, 140 Mass. 224.

2. "A pauper who has been a resident of the city of Cambridge from May 1, 1894, to the present time, was assessed poll taxes in 1894, 1895 and 1896, which taxes were paid on October 17, 1895, January 12, 1898, and November 13, 1900, respectively. Has such pauper a legal settlement in the city of Cambridge under the provisions of R. L., c. 80, § 1, cl. 5?"

This clause provides that a person of the age of twenty-one years, who resides in any place within this Commonwealth for five consecutive years, and within that time pays all State, county, city or town taxes, duly assessed on his poll or estate for any three years within that time, shall thereby acquire a settlement in such place. I am of the opinion that it was clearly the intention of the Legislature to require that not only the assessment of the specified taxes, but also the payment thereof, should be made within the period of five consecutive years. See P. S., c. 83, § 1, cl. 5; 1 Op. Atty.-Gen. 519; St. 1898, c. 425, § 1.

It follows, therefore, that the pauper in question did not acquire a settlement in Cambridge.

MILITIA — BOARD OF EXAMINERS — COMMISSIONED OFFICER —
INABILITY TO APPEAR FOR EXAMINATION BY REASON OF
SICKNESS.

The Board of Examiners may accept competent proof of the inability of an officer to appear before such Board for examination within the limit of time required by R. L., c. 16, § 57; and, if such inability was occasioned by ill health, may postpone the time of examination

To the
Adjutant-
General.
1902
February 6.

You inquire, in your letter of January 25 to this department: First, if an officer, duly elected and commissioned in the militia, and ordered to appear for examination, as required, within forty days, and who, by reason of sickness, fails to appear, and, as evidence of his inability to appear from such cause, furnishes to the Board of Examiners the certificate of his attending physician, does such officer come within the provisions of R. L., c. 16, § 57? Second, is it obligatory that such officer, who did appear before the examining Board after the expiration of forty days, and was examined and found competent, must be discharged?

To your first question I have to say that, while the language of the statute to which you refer is in form directory, it should be construed liberally enough to permit the Board of Examiners to accept competent proof of an officer's inability to appear before it within the required limit of time; and the Board of Examiners, being satisfied that the inability was caused by ill health, may, in my opinion, postpone the time of examination, and the examination then held would be within the intent and purpose of the statute.

To your second question I have to say that I am of opinion that, if the officer be found qualified upon such postponed examination, he neither ought to, nor must, be discharged from the service; but the result of such examination would be the same as if the examination had been held within the limit of time fixed by the statute.

COMMISSIONERS ON FISHERIES AND GAME — PROTECTION OF LOBSTERS — SHORT LOBSTERS.

R. L., c. 91, § 88, in terms makes the possession of protected lobsters an offence, without regard to the place where they were caught or the intent of the possessor as to their disposition.

You request the opinion of the Attorney-General upon the construction of the statute relating to lobsters.

To the Com-
missioners on
Fisheries and
Game.
1902
March 14.

R. L., c. 91, § 88, provides that whoever sells or offers for sale, or has in his possession, an uncooked lobster less than ten and one-half inches in length, shall forfeit a penalty for every such lobster.

First. — This section in terms makes it an offence to have in one's possession protected lobsters, without regard to the place where they were caught, and without regard to the intent of the person in possession as to their disposition. It applies as well to lobsters imported from other States or countries as to lobsters caught within the waters of this Commonwealth. Its evident object is to prevent Massachusetts lobsters from being sold under pretence of their having been imported. *Commonwealth v. Savage*, 155 Mass. 278.

It is to be noted that the statute makes a distinction between short lobsters and egg-bearing lobsters. In § 86 the penalty is provided only for selling egg-bearing lobsters, or having them in one's possession with intent to sell them.

Second. — In the event that State officers, duly authorized to enforce the fish and game laws, find among packages of imported lobsters any the possession of which is prohibited, they may seize such lobsters and put them into Massachusetts waters. R. L.; c. 91, § 91. But if lobsters so found are in fact merely in transit through this Commonwealth to another jurisdiction, with no intent whatever to make disposition of them here, the authority to make seizures is not, in my opinion, clear. See *Commonwealth v. Young*, 165 Mass. 396.

Third. — The fact that a Massachusetts dealer receives protected lobsters from the British Provinces on a way-bill to

Boston, though he subsequently ships them without the Commonwealth, may warrant a finding that he was illegally in possession of them. Whether he was a mere forwarding agent for the foreign owners is a question to be determined only from the facts of each case. If it were proved that such dealer was a mere forwarding agent, and the protected lobsters were found here only in transit to another jurisdiction, it is not settled that such facts would be a valid defence. In *Commonwealth v. Young, supra*, this question is expressly left open.

CIVIL SERVICE — EMPLOYEE — DISCHARGE — REINSTATEMENT.

The discharge of an employee by an official lawfully empowered thereto, duly certified to and recorded by the Civil Service Commission, cannot be withdrawn and such employee reinstated by the successor in office of such official.

To the Civil
Service Com-
mission.
1902
April 3.

In answer to your inquiry set forth in your letter of February 15, I state my opinion upon the several points as follows: —

The facts upon which the inquiry is based are plainly and substantially set forth in your letter, and I understand them to be in effect as follows: one Patrick Geoghegan was an inspector of work in the street department of Boston, where he had been employed for many years prior to March 25, 1901, when he was discharged by the then superintendent of streets, having authority to make such discharge. A due record was made, stating that the cause of discharge was for the good of the service. The position formerly held by Geoghegan was included within civil service classifications. The discharge was duly reported to the Civil Service Commission.

I am advised that the superintendent of streets who made the discharge has retired from office, and a successor is now acting in his place. The latter now submits to your Board a request that he be permitted to withdraw the discharge, and thereby restore the former employee to his place. The reason suggested for this withdrawal is that the present superintendent of streets is of the opinion that the discharge was based upon errors of fact, or was in fact unjustifiable, the discharge not being

impeached upon any ground of a clerical error in the record, but upon the facts which the record correctly sets forth.

I am of the opinion that the discharge, having been made by one lawfully empowered to make it, and it having been duly recorded and certified to your Board, must be held, for the purposes of your administration, to be conclusive. I am of the opinion that you may not and ought not to consent to the withdrawal of the discharge as suggested by the present superintendent of streets, and, indeed, I know of no authority that would permit you to give this permission. Assuming, therefore, as we must, that, the discharge having been made, a vacancy in the position now exists, it can be filled only in compliance with the rules of the commission by a new appointment.

The law appears to be perfectly clear, and the reason for the law is as plainly evident; for if, upon every change of administration in any department of service subject to the ruling of your commission, the records of discharges or adjudications by former incumbents of office were to be reviewed, vacated or set aside, obviously great confusion would result, and the plain intent of the civil service law would be evaded.

BOARD OF COMMISSIONERS OF SAVINGS BANKS — INVESTMENTS
FOR SAVINGS BANKS — BONDS OF TOWN OF DANBURY,
CONN. — VALUATION — TOWN ASSESSORS.

In determining whether or not bonds issued by the town of Danbury, Conn., may be a legal investment for Massachusetts savings banks, under the provisions of R. L., c. 113, § 26, which permits investment to be made in the bonds of any town in Connecticut whose net indebtedness does not exceed three per cent. of the last preceding valuation of the property therein for the assessment of taxes, the Board of Commissioners of Savings Banks must be guided by the valuation of the town assessors, and not by that of the State Board of Equalization of Connecticut, whose function under the laws of that State is simply to adjust the valuations among the several towns so that the burden of the State tax may bear equally upon them.

You request my opinion whether an issue of bonds by the town of Danbury, Conn., may be a legal investment for Massachusetts savings banks.

To the Board
of Savings
Banks Com-
missioners.
1902
April 8.

R. L., c. 113, § 26, provides that such investment may be made in the bonds of any town of Connecticut whose net indebtedness does not exceed three per cent. of the "last preceding valuation of the property therein for the assessment of taxes." The last assessed valuation of the property of Danbury, as reported by the town to the State Board of Equalization was \$7,978,801. To this the State Board added \$5,110,000, making the last valuation of Danbury, upon which as a basis State taxes are imposed, \$13,088,801. The net indebtedness of the town, including this bond issue, is more than three per cent. of the last town valuation and less than three per cent. of the last State valuation; therefore, it is necessary to decide which is the valuation contemplated by our statute.

The last valuation by the State Board, being a valuation of the property in the town for the assessment of State taxes, is in a sense within the letter of the statute. It is the completed valuation which, for the purposes of the State tax, must be substituted by the town clerk for the valuation as made up by the town authorities. Since the town might evade its proper share of the State tax by making a low valuation and adopting a high rate, the designed effect of the State Board's action is to hold each town to its fair share of the burden. The State Board, however, does not make a revaluation in detail of the items appraised by the town assessors; and, in my opinion, the result which it reaches is rather an estimate of the town's share of the public burden than a strict valuation of the town's property, such as our statute contemplates.

The proceedings required by the law of Connecticut, G. S., §§ 3815 to 3894, are in brief as follows: each town assessor equalizes his list of valuations and lodges it in the town clerk's office on or before December 31. Thereupon the Board of Relief, a town Board, meets, and determines all appeals and equalizes and adjusts the assessed valuations of all the assessment lists. From the action of this Board appeal lies to the Superior Court. The town clerk, on or before March 1, sends an abstract of the lists thus corrected by the Board of Relief to the State comptroller. Then the State Board of Equalization, consisting of the

comptroller and treasurer, meets to "equalize and adjust the assessment lists of each town by adding to or deducting from its lists or any part thereof such amount as, when compared with the valuations of other towns, will equalize the same." These lists, after they have been so equalized and adjusted, constitute the general list of the State upon which the State taxes are imposed. Thereupon the town clerk is notified of any change made by the State Board. He makes his town list correspond, and the State taxes are levied and collected on the list as so modified.

Valuation is a judicial process. There must be some sort of opportunity to be heard on the question of value, else the taxpayer's property is taken without due process of law. See *Hagar v. Reclamation District*, 111 U. S. 701; *Kentucky Railroad Tax Cases*, 115 U. S. 321. This is afforded by the proceedings in the equalization by the Board of Relief, with appeal to the Superior Court. There can be no question, therefore, that the valuation of \$7,978,801 is a legal one.

The State Board, on the other hand, determines without a hearing, and adds to the town valuations with no statutory limit upon its discretion. In the present case it has nearly doubled the valuation of Danbury. Without suggesting that in this instance it has exceeded its power, I think the Board might increase the valuation of a town to such an extent that the increased tax required of a town would amount to the taking of property without due process of law, or to an unreasonable discrimination against the town. *In re de las Casas*, 180 Mass. 471.

In view of the facts that the town valuation as equalized by the Board of Relief is undeniably valid; that the function of the State Board of Equalization is simply to adjust the valuations among the towns so that the State tax may bear equally upon them; that this adjustment is liable to possible abuse, and is in strictness not a valuation of property within the town at all, — I am of the opinion that your Board should be governed by the valuation of the town assessors.

PUBLIC PARKS OR BOULEVARDS — REGULATION OF ADVERTISEMENTS — POLICE POWER — PUBLIC NUISANCE — COMPENSATION.

Local authorities in the various cities and towns of the Commonwealth have no authority under existing laws to regulate or restrict the display of advertisements beyond the limits of public parks, boulevards and ways.

A bill providing that the authorities having charge of parks or parkways may make such reasonable rules and regulations respecting the display of signs, posters or advertisements, near and visible from public parks or boulevards, as they may deem necessary for preserving the objects for which parks or boulevards are established and maintained, and that, after publication of such regulations, any sign, poster or advertisement maintained in violation of them shall be a public nuisance, is a valid exercise of the police power, and neither owners of property affected, nor persons having contracts for advertising prevented thereby from performing the same, would be entitled to compensation.¹

To the House
of Representa-
tives.
1902.
April 8.

I have the honor to acknowledge the receipt of the order of the House of Representatives, adopted March 20, 1902, requiring my opinion upon the following questions, viz.:—

“1. In case Senate Bill No. 57, House Bill No. 621, House Bill No. 811, or any similar bill regulating and restricting the display of signs, posters and advertisements on or near any public parks and boulevards, should be enacted into law, would owners of property affected by such legislation, or persons having contracts for advertising which could not be lawfully performed by reason of such legislation, be entitled to compensation?

“2. If the persons referred to in the foregoing questions are entitled to compensation, can the General Court, by any form of statute, deprive them of that right or prevent the right from coming into existence?

“3. Have the local authorities in the various cities and towns of the Commonwealth authority under existing laws to regulate and restrict the display of advertisements on or near public parks and boulevards?”

In the consideration of these inquiries, I take them out of the order in which they are presented. In answer to the third inquiry, I am of opinion that the local authorities in the various cities and towns of the Commonwealth have power, under exist-

¹ But see *Commonwealth v. Boston Advertising Co.*, 188 Mass. 348.

ing laws, to regulate and restrict the display of advertisements only within the limits of public parks, boulevards and public ways. At the boundary of private land their authority ceases.

The second inquiry is stated in this form: "If the persons (owning property affected by the proposed legislation, or having contracts for advertising which could not be lawfully performed by reason of such legislation) are entitled to compensation, can the General Court, by any form of statute, deprive them of that right or prevent the right from coming into existence?"

Confining myself to the precise form of the question, I reply that no statute nor phrase of legislation can constitutionally deprive a citizen of compensation to which he is lawfully entitled. It may be, however, that this direct reply does not measure the full scope of the inquiry intended by the Honorable House of Representatives to be transmitted to me.

I answer, further therefore, that I am of opinion that the Legislature may, within the lawful exercise of the police power, impose restrictions upon the use and enjoyment of private property, and that no right to recover damages is thereby created, the reason being that no private right in such case has been violated, and no property of the citizen taken, since all ownership of property is conditioned upon, and subject to, the right of the public exercised through legislative authority, to restrict the enjoyment of private property in such reasonable manner and to such reasonable degree as the public safety and welfare may require. The exercise of this police power must, however, always be conditioned upon the circumstances which gave rise to its invocation. Not every taking, nor restriction, of the use of property, by public authority and without compensation, can be justified under the police power. The restriction must be, if not necessary, at least reasonable. If it be the intent of the Legislature to exercise this police power, it must be unequivocally expressed in the act, and this may, perhaps, best be accomplished by making no provision for compensation. There must be no conditional nor alternative provision in this regard. If the act be a lawful exercise of police power, the owner of property has, and can have, no right to compensation. If the legislation

be not within the lawful limitation of the police power, any impairment of property rights thereunder would be inoperative, as unconstitutional. I am led, then, to consider the limitations which define the scope of this police power, upon the issues raised by the first inquiry, of the Honorable House of Representatives which is stated as follows: "In case Senate Bill No. 57, House Bill No. 621, House Bill No. 811, or any similar bill regulating and restricting the display of signs, posters and advertisements on or near public parks and boulevards, should be enacted into law, would owners of property affected by such legislation, or persons having contracts for advertising which could not be lawfully performed by reason of such legislation, be entitled to compensation?"

Senate Bill No. 57 differs from the two House bills in that it gives the local authorities power to determine the character of all offences. Such power might be exercised in such a way as to make the statute objectionable. This bill and House Bill No. 811 fix a limit in feet beyond which the rules of the park authorities shall have no effect. In my opinion, such limitation is unnecessary to the validity of the act, and is arbitrary in its effect.

I discuss, therefore, only House Bill No. 621, which seems best designed to accomplish what I assume to be the intent of the Legislature, and carefully guards the rights of property owners.

The bill provides that the authorities having charge of parks or parkways may make such reasonable rules and regulations respecting the display of signs, posters or advertisements, near, and visible from, public parks or boulevards, as they may deem necessary for preserving the objects for which such parks or boulevards are established or maintained; and that, after publication of the regulations, any sign, poster or advertisement maintained in violation of them shall be a public nuisance.

Any use of private property which materially interferes with the public comfort, except in those cases where the reasonable requirements of the owner afford him justification or excuse, is a nuisance. Noises and odors have always been treated as nuisances, even without legislative adjudication that they are un-

wholesome. *Davis v. Sawyer*, 133 Mass. 289; *Commonwealth v. Harris*, 101 Mass. 29; *Commonwealth v. Perry*, 139 Mass. 198.

There is no legal reason why an offence to the eyes should have a different standing from an offence to the other organs. To strike the unwilling ear is in principle the same as to catch the unwilling eye. Obnoxious signs have rarely been held to be actionable nuisances, because only lately has the attention of the courts been called to this aggressive method of disfiguring the landscape.

An advertisement upon private land anywhere may be a public nuisance. In every case it would be a question of what is reasonable under the circumstances. The right to put glaring signs where people may not escape them is measured by the degree of annoyance to which the public may be reasonably required to submit for the benefit of private interests. The standard must be determined by the effect of posters upon people generally, in the locality where they are put, — not by their effect upon those who are peculiarly sensitive, nor upon those, on the other hand, whose optic nerves will bear the harshest stimulation without inconvenience. The Legislature may very appropriately recognize and deal with the effect upon people in general of unrestrained scenic advertising, and take measures for its proper repression; and it has often declared certain conditions or objects to be nuisances in themselves, and provided that they may be regulated and controlled by local authorities. See *Train v. Boston Disinfecting Co.*, 144 Mass. 523; *Langmaid v. Reed*, 159 Mass. 409; *Newton v. Joyce*, 166 Mass. 83.

Persons whose property is affected by such restrictions have no right to compensation, because one of the incidents to property is a condition that it shall not be used so as unreasonably to impair the interests of the community. See *Commonwealth v. Gilbert*, 160 Mass. 157.

Similar acts have generally been upheld. In *ex parte Casinello*, 62 Cal. 538, an ordinance giving the superintendent of streets power to determine where on private land rubbish and broken crockery-ware might be dumped was declared valid; so an ordinance prohibiting the beating of a drum on the streets

without a permit, — *re Flaherty*, 105 Cal. 558; so a law declaring dense smoke a public nuisance was upheld on the ground that the public comfort was involved, it being immaterial whether such smoke was dangerous to health or to property, — *Moses v. United States*, 16 App. D. C. 428; likewise an ordinance that no person should blast rocks without a permit from the aldermen was sustained, — *Commonwealth v. Parks*, 155 Mass. 531; and a statute that no public bowling alley should be open after six o'clock in the afternoon, — *Commonwealth v. Colton*, 8 Gray, 488. There is no vested right in individuals to be exempt from police regulations.

It is to be specially noted that in other States advertising has been regulated throughout whole cities; and the legislation has been, when attacked, sustained, on the ground that the views in a city, if beautiful and unobstructed, constitute one of its chief attractions, and in that way add to the comfort and well-being of its people. *In re Wilshire*, 103 Fed. Rep. 620; *Rochester v. West*, 164 N. Y. 510; *The Gunning System v. Buffalo*, 75 N. Y. S. C., App. Div. 31.

It is, however, unnecessary, under the order of the honorable House of Representatives, to consider the power of the Legislature to restrict bill boards everywhere. For especial reasons, its power may be properly exercised in case of parks and boulevards.

In *Attorney-General v. Williams*, 174 Mass. 476, at 479, in discussing the well-established principle that the power of eminent domain may be exercised for the sole purpose of educating the public taste, the court says: "The grounds on which public parks are desired are various. They are to be enjoyed by the people who use them. They are expected to minister, not only to the grosser senses, but also to the love of the beautiful in nature in the varied forms which the changing seasons bring. Their value is enhanced by such touches of art as help to produce pleasing and satisfactory effects on the emotional and spiritual side of our nature. Their influence should be uplifting, and, in the highest sense, educational. If wisely planned and properly cared for, they promote the mental as well as the physical health of the

people. For this reason it has always been deemed proper to expend money in the care and adornment of them, to make them beautiful and enjoyable. Their æsthetic effect never has been thought unworthy of careful consideration by those best qualified to appreciate it."

Since the public good justified the spending of money to produce an æsthetic effect, the court will not hold that a reasonable regulation to preserve the effect for which the public money was spent is beyond the power of the Legislature.

The purpose of educating the public taste by means of parks being declared by the court a public one, and the Legislature being of opinion that the public comfort makes some regulation of the use of private property visible from them needful, the only limit upon the Legislature's power to regulate such use without compensation is that the regulation must not be clearly unreasonable. This bill does not authorize any except reasonable rules. It wisely leaves it to the local boards to formulate the rules, as these should vary according to the needs of the particular locality. Since it lies with the Supreme Court ultimately to determine whether any particular rule is reasonable, there can be no violation of the Constitution in this enactment.

The Legislature may delegate to such boards power to make rules, and provide that they may be enforced by suitable penalties. This is not a delegation of the power to enact laws. It is merely a delegation of administrative powers and duties. See *Opinion of the Justices*, 138 Mass. 601.

A person who has a contract for advertising, which this enactment makes illegal, has no more sacred right to be immune from such regulations than the one who owns the property upon which the contract was to be performed. All contracts are subject to such exercise of legislative power. See *Salem v. Maynes*, 123 Mass. 372.

Manifestly, neither party to such a contract, upon its becoming illegal by legislative enactment, can maintain an action against the other for its breach. See *Hughes v. Wamsutta Mills*, 11 Allen, 201; *Commonwealth v. Overby*, 80 Ky. 208; *Bailey v. De Crespigny*, L. R. 4 Q. B. 180.

In my opinion, therefore, in case this bill is enacted into law, neither owners of property affected thereby, nor persons having contracts for advertising prevented thereby from performing the same, would be entitled to compensation.

**METROPOLITAN WATER AND SEWERAGE BOARD — AUTHORITY
TO INSTALL METERS.**

The Metropolitan Water and Sewerage Board is authorized, under St. 1895, c. 488, to install a system of meters for the purpose of securing a more efficient distribution of water to the communities which are supplied by it.

To the Metro-
politan Water
and Sewerage
Board.
1902
April 10.

Your letter of April 7 requests my opinion whether your Board has power, under the water act, so called, to introduce meters by which the amount of water supplied to each municipality by your Board may be determined with reasonable accuracy; and you further inform me that, in the opinion of your chief engineer, sufficient advantages will arise from the system of meters through the greater facilities afforded for detecting breaks and leakages, and for the more efficient maintenance and economical administration of the work of distribution, to justify the necessary expenditure of money for that purpose.

I reply that, such being the facts, in my opinion the statute creating your Board (St. 1895, c. 488) gives it authority, as incident to the discharge of its prescribed duties, to install a system of meters to secure a more efficient distribution to the communities, and to ensure the proper conservation of the water which it is required to furnish them.

OLEOMARGARINE — LABEL ON PACKAGE.

R. L., c. 56, §§ 36 and 48, relating to marks on wrappers in cases of the sale of oleomargarine or renovated butter, is sufficiently complied with if the individual packages containing such merchandise are plainly marked by labels setting forth the contents; and where several packages, one of which contains oleomargarine, and is so marked, are enclosed in a common wrapper, it is unnecessary that such wrapper should also be labelled.

To the Agent
of the Dairy
Bureau of the
State Board of
Agriculture.
1902
April 11.

I have your letters of April 7, in which, referring to §§ 36 and 48 of c. 56 of the Revised Laws, relating to marks on wrappers in cases of the sale of oleomargarine or renovated butter, you ask my opinion, upon the assumption that two or more purchases are

made at a store, and all packages are placed in an outside wrapper for the convenience of the customer in diminishing the number of parcels, whether the law requires the distinctive mark on the outside of such parcel containing the specific parcels of merchandise which are themselves required to be labelled. You further inquire whether the law would be complied with if the required mark is on the outside of each of the individual packages within the package as finally made up for the convenience of the customer.

I am of the opinion that the law does not require that the outside of the parcel containing the several parcels of enclosed merchandise shall bear the specific label, if such be upon each of the parcels originally made up and delivered to the purchaser. Such delivery is, in my opinion, the delivery contemplated by the statute; and if, after such delivery, the customer requests, and in compliance with such request, expressed or implied, the seller, as agent for the purchaser, makes up the larger bundle, such transaction is no part of the original delivery; and, the law having been complied with as to each of the original packages, no further labels need be affixed by the seller.

SIDE ARMS — LITHUANIAN ST. KAZINER BENEFIT SOCIETY —
PARADE — MILITARY ORGANIZATIONS.

The Lithuanian St. Kaziner Benefit Society of Haverhill, a corporation organized under the general laws for purposes of benevolence and charity, is not within the provisions of R. L., c. 16, § 147, and may not, therefore, parade with side arms. In the absence of legislative enactment conferring the right to carry side arms, there is no authority adequate to grant such permission.

R. L., c. 16, § 147, providing that "any organizations heretofore authorized thereto by law may parade with side arms," is not limited to military organizations, but includes any organization which has been so authorized by law.

I have received your communication of April 4, requiring my opinion upon the matter of the petition of Matieus Bunker, secretary of the Lithuanian St. Kaziner Benefit Society of Haverhill, that such society may be permitted to parade with side arms. It is stated that the society has been legally incorporated under the laws of this Commonwealth, and I assume that to be the fact. I am not advised, however, whether the society is so organized

To the
Adjutant-
General.
1902
April 11.

under the general laws, or by special charter. From the tenor of the allegations of the petition, however, I believe I may safely assume, for the purpose of my reply to you, that the society has no special charter, but is organized under the general laws as a corporation the purpose of which is benevolence and charity. I must, therefore, further assume that the society does not come within the provisions of R. L., c. 16, § 147, as having been heretofore authorized by law to parade with side arms.

This question of express authority is a question of fact; and, if it be true that the authority has heretofore been expressly given by law, there would be no further occasion to deal with your inquiries. If I am right in the assumption that no such express authority has been given, it is clear to my mind that no such authority exists, and you cannot confer it.

You further inquire if permission can be given to this society to parade with side arms, pending the enactment of law granting authority to do so. The very suggestion that the society is awaiting the enactment of some law giving it the authority it desires makes it apparent that no such authority now exists, and may not be granted; so that here, again, in my opinion, you are precluded from giving the desired permission.

In answer to your third inquiry, I have to say that I am of the opinion that permission to parade with side arms must be conferred by legislative enactment. In the absence of such provision, there is no other authority adequate to give the permission sought for.

In answer to the fourth inquiry, I have to say that, if this society has petitioned the Legislature for an enactment giving it the authority it desires, the pendency of such act would require the society to await the will of the Legislature.

Your last inquiry I understand to be in effect a question whether the act which recites that "any organization heretofore authorized thereto by law" applies exclusively to military organizations, or extends as well to any association, military or otherwise. I believe that the words are to be taken in their more comprehensive meaning, and to refer to any organization whatever which has been so authorized by law. Of course the statutes

giving such authority by their very terms define the organization to which the authority extends; and it would be necessary to examine each of such statutes to ascertain the extent of the authority thereby granted.

METROPOLITAN WATER AND SEWERAGE BOARD — DUTY TO PROVIDE FOR EXISTING PIPE LINES — REPORT OF STATE BOARD OF HEALTH FOR 1895 — ALTERATIONS IN DIRECTION OF PIPE LINES — EXCAVATIONS IN STREETS — CITY ORDINANCES.

1. Under the provisions of St. 1895, c. 488, the Metropolitan Water and Sewerage Board has authority to alter the courses or directions of pipe lines which such statute requires it to construct, even if such alterations are in detail at variance with the scheme suggested in outline by the report of the State Board of Health for 1895, therein referred to.
2. A provision in the charter of the city of Newton, that no public street shall be dug up without first obtaining the written approval of the mayor, cannot be construed to impose a restriction upon the Metropolitan Water and Sewerage Board, acting for and in behalf of the Commonwealth in the prosecution of the work authorized by St. 1895, c. 488.
3. In laying pipes the Board must have regard to existing pipes or conduits in the streets, and to any definite existing plan for the future construction of additional pipe lines by the city; but it cannot bind itself to make provision for pipes not now in existence nor a part of any adopted plan.

I beg to acknowledge your communication of April 4, asking my opinion as to the rights and powers of the Metropolitan Water and Sewerage Board in laying and maintaining pipe lines in the streets of the city of Newton. Your communication informs me that the pipe lines intended to be laid are extensions of the Weston aqueduct from its end in Weston near the Charles River to the Chestnut Hill reservoir, through portions of the metropolitan district in which Newton is included.

By § 3 of c. 488 of the Acts of the year 1895, the Board was required to construct a system of metropolitan water works substantially in accordance with the plans and recommendations of the State Board of Health contained in their report of the year 1895. The building of this Weston aqueduct was a part of the general scheme so recommended by the State Board of Health, though its immediate construction was postponed. The report of

To the Metropolitan Water and Sewerage Board.
1902.
April 12.

the State Board of Health refers to the necessity of the Weston aqueduct, and of pipes to be laid from it through the metropolitan district. Estimates were also given of the cost of this aqueduct and for laying pipes therefrom, some to be constructed within the first ten years, others within the second ten years. Mr. Stearns, the chief engineer for the Board, in his accompanying report gave a description of this Weston aqueduct, and spoke of the pipe lines to be laid as not being carefully located. A map which was submitted with the report shows two proposed pipe lines, and at the time it was suggested by the chief engineer that an aqueduct would be substituted for a part of the distance for one of these lines, which at present it is not proposed to build.

The pipe line about to be laid, and concerning which question is now raised by the mayor of Newton, runs through Auburndale and Commonwealth avenue extension (which was not built at the time of the report of the State Board referred to) to the Chestnut Hill reservoir, about midway between the two routes shown on the map.

The mayor of the city of Newton appears to base his objection to the prosecution of this work by the Commonwealth on the following grounds:—

First.—That the charter of the city of Newton, c. 1, § 31 (Acts of 1897, c. 283), provides that no public streets shall be dug up without first obtaining the written approval of the mayor. No person or corporation, except officers and employees of the executive departments, shall dig up any public street without first furnishing to the street commissioner sufficient security for restoring such street to a condition which shall be satisfactory to said commission, and for keeping the street in such condition for six months after the completion of the work. Under this provision he is required to obtain security that the street and existing pipes therein will be left in as good condition and as accessible as before the work was done; it having been the custom for a contractor, corporation or department opening the streets to pay to the street department the cost of restoring and maintaining the same for a reasonable term, the street commissioners doing the work and becoming responsible therefor. The mayor, therefore,

as I am informed, demands that, before approving the projected work of the Metropolitan Board, security for the sum of \$23,225, the estimated cost of restoring the streets to a satisfactory condition, shall be given by that Board.

Second. — I am informed that the mayor contends that the report of the State Board of Health for 1895, and c. 488 of the Statutes of 1895, did not contemplate such use of the public streets as that now proposed by your Board, and asserts that the proposed future pipe line marked on Plan 6 in the report of the State Board of Health is shown through private land nearly the entire distance from the Weston aqueduct to the Chestnut Hill reservoir, while the line heading for Spot Pond does not pass through any part of the city of Newton; contending, apparently, that the line of pipe proposed to be laid by the Metropolitan Water Board in the city of Newton is not described or set forth in the report of the Board of Health referred to in the metropolitan water act, and that, therefore, the laying of such pipe is beyond the power of your Board.

Your Board desires the opinion of the Attorney-General upon the following question: "Is not the Board authorized, under the provisions of the act of 1895, to proceed to dig up public streets and lay pipes in them as proposed, notwithstanding, as suggested by the mayor, that 'the proposed future pipe line marked on Plan 6 in this report is shown through private land nearly the entire distance from the Weston aqueduct to Chestnut Hill reservoir, while the line heading for Spot Pond does not pass through any part of the city of Newton?'"

I understand this inquiry is directed to the question whether the laying of this line of pipe in the city of Newton not upon the actual lines laid down in the original report of the Board of Health is within the power of your Board; and in effect, as I understand it, you inquire whether the Board is bound to rigidly follow the precise letter of the plans of the Board of Health referred to in the original act.

Reference to the provisions of this act (§ 3) seems to me to conclusively answer this inquiry to the effect that your Board is required only to construct a system of work in substantial accord-

ance with the plans and recommendations of the State Board of Health. The Legislature did not intend to restrict your work to any precise plan. Much of the detail of location and construction had necessarily to be left to the discretion of the Board, and to be determined by conditions that could not have been foreseen and prescribed by precise legislation. I entertain no doubt that, under the provisions of the metropolitan water act, your Board has power to alter the courses or directions of pipe lines, even if such alterations shall be at variance in detail with the scheme suggested in outline by the report of the Board of Health. The Board must follow the general recommendations of that report, but is not inflexibly bound by intimations and suggestions set forth therein, for they do not and were never intended to have, in my opinion, the effect of an absolute and fixed plan. I am, then, of the opinion that the proposed pipe line through the city of Newton, according to the present plan of your Board, may be lawfully laid and maintained under the authority vested in your Board by the Legislature.

Upon the second inquiry you submit to me, I am of the opinion that the provisions in the charter of the city of Newton, which have been referred to, cannot be construed to impose a restriction upon the Metropolitan Water and Sewerage Board, which acts for and in behalf of the Commonwealth in the prosecution of a work authorized by the Legislature. Section 9 of c. 488 of the Statutes of 1895 provides that the Board, in carrying out the powers and duties conferred upon them, "may carry and conduct any aqueduct, conduit, pipe, drain or wire, under or over any water course or any railroad, street or other way, in such a manner as not unnecessarily to obstruct or impede travel thereon; may dig up any such road, street or way, and lay, maintain and repair aqueducts, conduits, pipes, wires and other works beneath the surface thereof, conforming to any reasonable regulations made by the mayor and aldermen of cities and the selectmen of towns, respectively, wherein such works are performed, and restoring, so far as practicable, any such road, street or way to as good order and condition as the same was in when such digging was commenced."

In conferring such authority upon the Water Board, the Legislature could not have intended or contemplated that its exercise should be made dependent upon the action of the mayor of any city, in the absence of express enactment to that effect; for, were the operations of the Board subject to such a possible contingency, it is clear that it would have been possible for municipal authorities to have prohibited the prosecution of the work, or to have so impeded it as to impose great expense and delay upon the Commonwealth.

The provision of § 9, above referred to, requiring that the work shall conform to reasonable regulations made by the mayor and aldermen of cities wherein such works are performed, and restoring, so far as practicable, the way in the condition it was in when such digging was commenced, is to be construed as confined to rules and regulations attendant upon the progress of the work, and consequent upon it. These regulations are not conditions precedent, but conditions attendant; and require merely that the work, as it proceeds, shall be conducted conformably to reasonable regulations of the local authorities. The obligations imposed by the statute upon your Board to ensure proper prosecution of the work and restoration of the streets and ways are as effective, efficient and far-reaching, and, indeed, are almost in the same language, as the requirement which the statute authorizes a municipality to impose where the digging of streets is to be done by any party other than the Commonwealth. Where the Commonwealth has imposed upon itself the obligation of restoring the streets to their original condition, no ground exists, in my judgment, for the contention that its agents, in carrying out the work so entrusted to them, can be required to give security for an obligation which the Commonwealth has declared it has assumed. The State can be required to give no bond to her own citizens.

Your third inquiry is stated as follows: "The city of Newton has constructed surface drains along one side of the Commonwealth Avenue extension, where it is proposed to lay the pipe line, and provides for connection with the other side of the avenue at the entrance of several of the side streets. The Board would

make proper provision for all such system of drains already laid. Can the city of Newton compel it, in addition, to deposit money or give bond or agreement for the construction of additional cross-drains in future years, when additional streets not now laid out are built?"

In my opinion, the city of Newton can require no bond, obligation, promise or agreement from the Commonwealth in any event. In laying its pipes, the Metropolitan Water Board must have regard to the existing pipes or conduits in the street, and as well to any definite or adopted plan for future construction of the city's pipes. It cannot now make provision, nor can it bind itself or be bound to make provision for pipes not now in existence, nor a part of any known or adopted plan. If in the future some new scheme and new system of pipes be adopted and laid by the city of Newton, they must be so adopted and laid with regard to the conduits of the Commonwealth, then existing by lawful right and by priority of location.

I have endeavored to clearly answer your several inquiries. If I have failed to do so, I will advise you further.

MEMBER OF CONGRESS — FIFTY-SEVENTH CONGRESS — VACANCY
— RESIGNATION — FORMAL NOTICE — GOVERNOR.

After the repeal of St. 1891, c. 396, by St. 1901, c. 511, providing for the election of representatives in the Fifty-eighth Congress, and in each subsequent Congress until otherwise provided by law, no act remains in force by which the Commonwealth is divided into districts for the choice of Representatives in the Fifty-seventh Congress; and when a vacancy occurs in the representation of any district for such Congress, legislative action is necessary to authorize the election of a successor.

The Governor can have no official knowledge of the resignation of any Representative in Congress from the Commonwealth, or of any purpose of such member to retire, until formal notice of the resignation has been received by him.

To the
Governor.
1902
April 15.

You require my opinion as to the necessity or advisability of new legislation to provide for the election of a successor to the Hon. William H. Moody, Congressman for the sixth district, in case of his resignation before the expiration of the term for which he was elected.

Chapter 396 of the Acts of 1891 divided the Commonwealth into districts for the choice of Representatives in Congress. Under this act, the sixth district, now represented by Mr. Moody, was created, and continued until a reapportionment should be made, or there should be legislation repealing or terminating this apportionment. By c. 227 of the Revised Laws the above statute of 1891 was expressly repealed, taking effect December 31, 1901.

Chapter 511 of the Acts of the year 1901, enacted June 14, 1901, and now embodied in § 422 of c. 11 of the Revised Laws, divides the Commonwealth into districts for the choice of Representatives in Congress, the language being: "For the purpose of electing representatives in the fifty-eighth congress of the United States, and in each subsequent congress, until otherwise provided by law, the commonwealth shall be divided into," etc. It thus appears that the new districts so created and elections pursuant thereto are confined to membership in the Fifty-eighth Congress. The old districts in which elections to the Fifty-seventh Congress were or could be made no longer exist, by reason of the repeal by the Revised Laws, above cited.

In case a vacancy occurs in the representation of any district for the Fifty-seventh Congress, it is my opinion that it is necessary to fill such vacancy during the continuance of the Fifty-seventh Congress, and by an election to take place in the district constituted for the election of members to that Congress. It is apparent that there is now no act in force by which the Commonwealth is divided into districts for the election of members in the existent Congress, or providing for any election of members except for the Fifty-eighth Congress not yet convened or in existence.

If it be deemed advisable that a successor be appointed to a member resigning from the Fifty-seventh Congress, it seems that legislative action must be taken to provide for the election of such successor. It should be, in my opinion, in substance as follows, its caption being, "An act to repeal an act repealing the provisions of chapter 396 of the Acts of the year 1891, entitled, 'An act to divide the Commonwealth into districts for the choice of representatives in the Congress of the United States.'" "Section

1. So much of chapter two hundred and twenty-seven of the Revised Laws as repeals chapter three hundred and ninety-six of the acts of the year eighteen hundred and ninety-one is hereby repealed, and said chapter three hundred and ninety-six of the acts of the year eighteen hundred and ninety-one is hereby revived, and shall continue in full force and effect for the purpose of electing representatives to the Congress of the United States, to fill any vacancies that may occur from death, resignation or otherwise in the Fifty-seventh Congress of the United States, but for no other purpose." "Section 2. This act shall take effect upon its passage."

In answer to the further inquiry of Your Excellency, I am of the opinion that Your Excellency can have no official knowledge of a resignation of any Representative in Congress from the Commonwealth, or of any purpose of such member to so retire, until official notice of the resignation has been received by Your Excellency. Formal notice from the sitting member, either of his actual resignation or of his definite and fixed purpose to resign, stating the time when such resignation shall take effect, is a necessary precedent to any action to be taken by Your Excellency for the purpose of providing for or filling such vacancy.

CIVIL SERVICE — EXECUTIVE CLERKS OR SECRETARIES IN DIVISIONS OF THE STREET DEPARTMENTS OF THE CITY OF BOSTON.

Officers to be appointed as executive clerks or secretaries in the several divisions of the street department of the city of Boston, whose duties will be to arrange for hearings and other matters, and, in general, to take charge of the business of such divisions and to stand in the places of the deputy superintendents during their absence, such positions involving some incidental clerical work as well, are within Schedule A, Class 2, of Rule VII. of the civil service rules, and must be selected in accordance with such rules.

To the Civil
Service Com-
missioners.
1902
April 21.

I have had under consideration your inquiry of March 21, relating to the status of proposed officers to be appointed as executive clerks or secretaries, to have charge of the several offices under divisions of the street department of the city of

Boston, when the deputy superintendent of such department is absent; the general duties of such proposed appointees being, as stated to me, to arrange for hearings and other matters, and, in general, to take charge of the business of the office and stand in the place of the deputy superintendent during his absence, and arrange and keep the run of the business of the division, — being responsible and answerable to him, — the work of such appointees involving some incidental clerical duty. It is further suggested that the position is, of necessity, a confidential one in its relation to the deputy superintendents.

I assume the duties to be discharged by the proposed officers are aptly described as above, and I am of opinion that they fall within the civil service law, and that such officers must be appointed under its requirements. I assume that the city, or its executive, has authority to create, and, adhering to the civil service rules, to appoint and employ, such officers.

I am of the opinion that the proposed office falls within Schedule A of Class 2 of Rule VII. of classification of service by your commission. It seems to me that it is within the definition of "clerk" or "agent," or a person rendering service similar to that of clerk or agent. It is possible that the office would be within the classification of Class 12 of Schedule B, as being that of an assistant superintendent or assistant deputy; but it is clear to my mind that, under the statement of the duties of the office, as submitted to you, the incumbent could not be held to be a chief superintendent, and therefore is not within the exception in Class 12.

I note the suggestions of the superintendent of streets, accompanying his inquiry, calling attention to the fact that, as the proposed officer must perform certain executive duties, have charge of the business of the office and stand in the place of the deputy during his absence, he must hold a relation of trust and confidence to his chief; and that therefore the civil service rules ought not to apply.

I cannot bring myself to this position, and, indeed, it seems to me to be untenable in view of the express adjudication of the Supreme Court in the case of *Attorney-General v. Trehy*, 178 Mass. 186, 193, where the court distinctly holds that the exist-

ence of a confidential relation between the chief and the subordinate does not preclude the position from being classified as one to be filled under the rules of the Civil Service Commission; it being further held that the statute leaves to the commissioners the power, in their judgment and discretion, to require offices involving confidential relations between the incumbent and his superiors to be filled under the rules, or to so classify them that they will be free from such rules. It seems to me that the offices in question have been so classified by the commission as to bring them within the definition of Schedule A, Class 2, Rule VII.

I therefore advise you that, in my opinion, if the proposed offices are created and appointments made thereto, they must be made pursuant to the rules of the civil service department.

CIVIL SERVICE — DEPUTY STREET COMMISSIONER OF THE CITY
OF LYNN — CHIEF SUPERINTENDENT.

An official designated as the "deputy street commissioner of Lynn," who is appointed by the board of public works, an elective board created by the revised city charter of Lynn (St. 1900, c. 367), having charge, subject to the direction of the city council, of all streets and ways, sidewalks, bridges and sewers, the supervision of wires, street lighting and street watering, and the supervision and care of all public buildings, is not a chief superintendent of any department, since he does not represent such Board throughout its jurisdiction; and he is therefore subject to the civil service rules.

To the Civil
Service Com-
missioners.
1902
April 22.

Your letter of March 21 requests my opinion whether the position of an officer designated "deputy street commissioner of Lynn" is within the classified service.

Under the revised city charter (St. 1900, c. 367), a board of public works is created, consisting of three members, elected by popular vote, which has charge, subject to the direction of the city council, of all streets and ways, sidewalks, bridges and sewers, the supervision of wires, street lighting and street watering, and the supervision and care of all public buildings.

This board has appointed an officer, called a deputy street commissioner, to act as its executive officer, directly responsible to it, in taking charge of the streets and ways of the city, with the duties which generally belong to the position of a city super-

intendent of streets. The question is, whether he is to be appointed in accordance with the civil service rules. Plainly, he is a superintendent within Class 12 of Schedule B of Rule VII., and must be so appointed, unless the position comes within the saving clause of that class which exempts the chief superintendent of a department.

If this officer represented the board of public works in every branch of its authority, he might be the chief superintendent of its department. He represents the board, however, only in its control of streets and ways. Therefore, the question is, whether the division of streets and highways, being the division of municipal affairs, usually controlled by a superintendent of streets, but in Lynn under the general charge of the board of public works, is a department within Class 12 of Schedule B. In other words, the question is, whether the board of public works may divide its department into various "departments."

Beginning with the highest, there are two departments in Lynn, the mayor and city council being one, the school committee the other. Probably, however, these are not the only departments intended in the rule.

The charter further provides for administrative officers, including a board of public works (§ 34, cl. XII.). This board, it seems to me, is in charge of a department. It has power to appoint all subordinate officers, clerks and assistants therein (§ 38). A superintendent representing it throughout its jurisdiction might be the chief superintendent of a department.

There is, however, no authority in the charter for the creation of a "department" by an administrative board, so that the board may be at the head of several departments at once. The city council may establish additional boards (§ 34, cl. XIII.), and such a board, "having the charge of a department," may appoint subordinates. Thus the city council may create a new department, it seems, just as it may consolidate existing departments. But if any department were at liberty to subdivide into "departments" at its pleasure, it would be impossible to set a limit, defined by law, to their number and to the number of chief superintendents. Subdivision might extend so far that each

clerk would be the chief superintendent of his own department. In my opinion, the authority for subdivision must be found, if at all, in the charter or in the general provisions of law. I find no adequate authority, upon the conditions stated, for the appointment of the proposed officer except in accordance with the requirements of the civil service rules.

GAS COMPANY — INCORPORATION — PURPOSE OF ORGANIZATION
— DISTRIBUTION OF GAS TO PUBLIC.

An organization proposed to be incorporated for the purpose of manufacturing and selling coke, tar, ammonia, gas and other products of coal, but with no intent or purpose to engage in the business of distributing gas to the public, may incorporate under the provisions of R. L., c. 110, § 5.

To the Com-
missioner of
Corporations.
1902
May 1.

I beg to acknowledge your communication of April 3, requiring my opinion upon the question whether an organization proposed to be incorporated "for the purpose of manufacturing and selling coke, tar, ammonia, gas and other products of coal," but with no purpose or intent to engage in the business of distributing gas to the public (this limitation to appear in the articles of incorporation), is to be considered a gas company within the meaning of § 9 of c. 110 and of c. 121 of the Revised Laws.

In reply, I have to say that the provisions of c. 110 and of c. 121 of the Revised Laws do not necessarily apply to the same conditions; and I am of the opinion that a corporation may be within the scope of c. 121 as a gas company, though not organized under the provisions of § 9 of c. 110. Having regard to the stated purpose of the proposed corporation, I am of opinion that it may be organized under § 5 of c. 110, and that its purpose, as above stated, does not compel its organization under § 9 of the same chapter.

I believe that I have thus answered the inquiry that you desired to submit to me. I may, however, supplement this statement by saying that I do not now pass upon the question whether this corporation, so organized under § 5, would or would not be subject to the supervision of the Gas Commission, under the provisions of c. 121.

INSURANCE — FRATERNAL BENEFICIARY CORPORATION — MANAGEMENT OF FUNDS — SUPREME LODGE — SUBORDINATE ORGANIZATIONS — BY-LAWS — AMENDMENT.

R. L., c. 119, regulating the conduct of business by fraternal beneficiary corporations, requires that the supreme lodge or council shall be responsible for and have possession of the several funds provided for by law, and shall regulate the rates of assessments and the amounts of death or disability benefits to be paid; and a fraternal beneficiary corporation carrying on business under the provisions of such statute cannot amend its by-laws so as to provide that a member of the association shall be entitled to a sick benefit, to be paid by the subordinate lodge of which the holder of the certificate is a member, from funds collected by each subordinate lodge from its own members.

Your letter of December 17 requests the opinion of the Attorney-General upon the question of the legality of a proposed amendment to the by-laws of the Portuguese Fraternity of the United States, a fraternal beneficiary corporation doing business under the provisions of R. L., c. 119.

To the Insurance Commissioner.
1902
May 2.

The proposed change relates to the disability fund, and payments therefrom to persons entitled to receive "sick benefits." As at present constituted, the by-laws provide that the disability fund, for which provision is made in the statute, shall be paid to and in charge of the supreme lodge, which may authorize the subordinate lodges to retain a part of the receipts from disability assessments, and pay therefrom such disability benefits as are due to the members of the respective lodges, the supreme lodge collecting and holding the remainder of the fund for the use of the subordinate lodges which may be in need of assistance from it. The by-laws, as amended, are to provide that the members of the association shall be entitled to sick benefits, to be paid by the subordinate lodge of which the holder of a certificate is a member, from collections made by each subordinate lodge from its own members.

There are two grounds upon which the legality of this amendment may be questioned: first, upon the ground that the contractual relation between the corporation and the individual members thereof will be impaired; and, second, that the provisions of R. L., c. 119, regulating the conduct of business of fraternal beneficiary corporations, will be violated.

The objection to the amendment founded upon contract presents no serious difficulty. The decisions of the courts have already sanctioned changes in the by-laws of such corporations at least as sweeping as those under discussion, from the point of view of the contractual relation existing between the corporation and its individual members. Changes in the rates of assessment, when not in conflict with the by-laws, have been sustained (*Messer v. the Ancient Order of United Workmen*, 180 Mass. 321); and the corporation, if the by-laws permit, may even amend them so as to affect the rights of a member to future benefits under a disability existing at the time when the amendment is made. *Pain v. Soci'té St. Jean Baptiste*, 172 Mass. 319. See also *Fullenweider v. Royal League*, 180 Ill. 621.

The proposed change may therefore be made under the power of amendment reserved in the by-laws "to adopt and to amend the constitution, laws and rules for its own government and membership and for the government of the members and lodges within such jurisdiction and control" (By-laws, c. 1, § 1), without impairing any obligation of contract subsisting between the corporation and its members.

The second question, however, as to whether or not the proposed amendment is a violation of the provisions of R. L., c. 119, is not free from difficulty. A consideration of the by-laws of the Portuguese Fraternity of the United States shows how important the matter is, and how far-reaching may be the ultimate outcome of such amendments; for, if the corporation has the right to delegate the power of assessment for a disability fund, and the payment therefrom of sick or disability benefits to subordinate lodges or councils, leaving such organizations the right to regulate the terms and condition of such payments, it may also delegate to subordinate lodges the power to determine whether or not those bodies will pay any such benefit at all. Yet the statute contains no positive prohibition in relation to the division of the disability fund among the subordinate lodges, and the collection of assessments from, and payments of sick benefits to, its members by each separate lodge in the management of its disability fund. If it is prohibited at all, it is prohibited by implication.

That the statute did not contemplate any such action by associations incorporated under its provisions, and that the result is contrary to the theory upon which the statute has grown up, is admitted; but it is contended that, inasmuch as the corporation has the general right, incident to incorporation, to make by-laws not inconsistent with law, such inconsistency only arises where the action contemplated by the proposed amendment conflicts with some direct prohibition in the statute; or, in other words, everything is permitted which is not expressly prohibited by some provision in the law (see R. L., c. 119, § 2).

Whatever may be the force of this reasoning, it is clear that the determination of the question must depend upon the construction and scope of the power reserved to the corporation to make by-laws not inconsistent with law, and, in this case, not inconsistent with the provisions of R. L., c. 119.

If such inconsistency can only arise upon a direct contravention of some express provision or prohibition in the statute, it may be admitted that the proposed amendment is not illegal. I am of opinion, however, that a broader definition of inconsistency must be applied than that above suggested. A by-law may be so framed as not to be in contradiction to any express provision of an act, and yet be so inconsistent with the whole spirit of the law as to render it an unlawful exercise of power on the part of the corporation to adopt it. That such may be the case, even with regard to the contractual relation entered into by the corporation with its individual members, is intimated by the court in *Messer v. the Ancient Order of United Workmen*, above referred to: "It may be conceded that some amendments might be so foreign to the general scheme and purpose of the organization, and so contradictory to its fundamental law and the contracts made under it, as not to be within the power of amendment referred to; but this is not true of an amendment which merely changes forms and methods, while the substance of the general plan and purpose of the organization is preserved."

Whether the amendment in question is so foreign to the general plan and purpose of the statute under which the Portuguese Fraternity is incorporated as not to be within the power of

amendment reserved to the corporation, may be best determined by a consideration of the scope and intention of c. 119. It was the evident purpose of the statute to place in the hands of the corporation as a whole the control and management of the death, disability and emergency funds provided for, together with the assessments therefor and the payments therefrom. Such funds are repeatedly referred to in the singular number, and provisions are made which could not conveniently apply if the disability fund were divided among the various subordinate lodges. "Before such certificate is granted, the corporation must present satisfactory evidence to the insurance commissioner that at least five hundred persons have each paid one advance assessment for its mortuary or disability business or both, if such business is combined, at its established rates," etc. (§ 4). "Section 7. A corporation . . . may hold as a death fund . . . not more than the amount of three assessments from a general or unlimited membership, or of three assessments from each limited class or division of its members; and in addition thereto may create, collect, maintain, disburse and apply an emergency fund in accordance with its by-laws. . . . The emergency fund shall be used only for the payment of death or disability benefits." "Section 8. Death, disability and expense assessments may be called together." Section 4, above stated, plainly sets forth the intention of the law that the Insurance Commissioner shall, through the corporation itself, have direct and restrictive control over the affairs and finances of the corporation, both as to mortuary and disability business.

The statute further contemplated a corporation represented by a supreme lodge or council, composed of the officers and directors of the corporation and such representatives as the subordinate organizations might elect in accordance with the by-laws, which should be responsible for and have possession of the various funds provided for by law, and should regulate the rates of assessment and the amounts of death or disability benefits to be paid.

Under by-laws similar to those which the Portuguese Fraternity of the United States proposes to adopt, instead of a single

corporation which is responsible for and in possession of the disability fund, there are numerous separate and irresponsible bodies which control their respective funds, collecting assessments and paying the so-called "sick benefits" in such manner as they may see fit. The practical effect of such a condition is that the corporation, as represented by the supreme lodge, has delegated its entire powers with regard to the conduct of disability business to the subordinate organizations. Such a corporation could not conveniently make use of the emergency fund for the payment of disability benefits. It could not collect death, disability and expense assessments together, and it would have made no adequate provision for the payment of benefits in case of disability, as provided by § 6.

The provisions regulating the management of the death fund clearly prohibit such a course with regard to that particular fund (§§ 6 and 7), and it is admitted that such a by-law, if applied to the death fund, is inconsistent with the provisions of the act. It is argued, however, that, because certain express provisions are made in §§ 6 and 7 for the collection, maintenance and disbursement of the death fund, which do not specifically extend to the disability fund, the respective funds are separable throughout the act; and that a disposition of the disability fund which would be clearly prohibited if attempted in the case of the death fund is not inconsistent with any of the provisions of the statute if limited to the disability fund.

Upon its face this contention has force, but it is, I think, refuted by consideration of the legislation on the subject. The statutes regulating this form of insurance, beginning with St. 1899, c. 442, did not establish death and disability business upon the same footing. By far the more important of the two was the payment of death benefits, and disability benefits were merely an incident. It was therefore natural that careful provision should be made for the collection, maintenance and disbursement of the death fund; while the disability fund, for payments which were incidental, was less carefully safeguarded, the idea being to keep on hand only sufficient funds to meet the claims as they arose (St. 1899, c. 442, § 13). It was, however, found advisable, under

later acts, to increase the amount to be kept on hand for the payment of disability benefits from the amount of one assessment to the amount of three assessments. The reason why no provision is made for the investment of the disability fund appears to be that it is desirable, if not necessary, to keep such fund on hand to meet promptly the claims which may arise from time to time. For example: there are many more disability claims presented in winter than in summer, owing to the greater prevalence of sickness in the former season; but, by keeping a considerable amount in the disability fund, it is possible to equalize, to a great extent, the assessment during the different seasons. The reason why no provision is made as to the person to whom disability benefits shall be paid similar to those in § 6, with regard to death benefits, is clearly because they are paid to the person himself, who may thereafter dispose of them as he desires.

For these reasons I am of opinion that no valid distinction can be drawn between the management of the death fund and the management of the disability fund, and that a disposition which is prohibited in the case of the former must also be held to be at least impliedly prohibited in the case of the latter.

Section 10 was also relied upon by the Portuguese Fraternity of the United States as supporting its position; but I am of opinion that it not only lends it no support, but is in effect one of the strongest arguments against the proposed amendment. The purpose of that provision was to enable a Massachusetts corporation, which consisted of a grand lodge and subordinate lodges, to maintain and continue their affiliation and relations with some supreme body, either incorporated or not, which was without the Commonwealth. The specific reason for its enactment was the conflict which arose in 1899 between the grand lodge of the Ancient Order of United Workmen, which was incorporated in Massachusetts, and the supreme lodge of that order, which was at that time unincorporated, over an attempt by the latter to levy a war assessment upon the Massachusetts corporation.

The language of the latter part of the section is significant. It provides, in effect, that a Massachusetts corporation may pay death benefits to or for the beneficiaries of deceased members

holding benefit certificates issued not by such corporation, but by the supreme body or by one of the grand or subordinate bodies thereof, organized or incorporated elsewhere than in this Commonwealth. The section further provides: "But this authority shall not permit the payment of benefits other than those arising from death." As I understand it, this provision authorizes the corporation to pay death benefit certificates which are not issued by the corporation itself, but by some organization which is a part of it or with which it is affiliated; from which it is to be implied that, under the other provisions of the chapter, only certificates issued by the corporation can be paid by it.

This authority is not extended in any case to the payment of certificates other than death certificates, and there can be no question as to the illegality of the payment by any organization of a disability certificate not issued by the corporation itself.

The issuance of such a certificate implies an obligation to meet the payment thereof whenever it may fall due; and this the corporation cannot assume under by-laws like those referred to, where the benefit business is entirely in the hands of individual subordinate lodges. It seems to me, therefore, that the legal and logical conclusion to be drawn from the requirement that the corporation shall issue benefit certificates is that it must also assume the obligation to provide for them; and that the issuance of such certificates can be made only by the corporation itself by the provisions of the statute; that the responsibility of paying them when due is placed upon the corporation, and authority cannot be delegated by it to subordinate lodges to maintain funds, and to assume the responsibility of paying the disability certificates in such manner and to such extent as such subordinate lodges may themselves determine.

Upon the whole, therefore, I am of opinion that the Insurance Commissioner cannot properly approve the proposed by-law of the Portuguese Fraternity of the United States.

FEOFFEEES OF GRAMMAR SCHOOL IN IPSWICH — CONSTITUTIONAL
LAW — VESTED RIGHTS — OBLIGATION OF CONTRACT.

Under St. 1786, c. 54, making perpetual the agreement set forth in Acts of 1765, c. 5, between the feoffees representing the original donors of land for a grammar school in Ipswich and the town of Ipswich to the effect that four feoffees on behalf of private individuals, and the three selectmen of the town of Ipswich for the time being, on behalf of the town, should be incorporated feoffees in trust for the management of such school, the rights of each group of trustees became vested, as well as the rights of the beneficiaries under the trust; and a bill to increase to six the number of feoffees on the part of the town would be unconstitutional, as impairing the obligation of the contract, and destroying vested rights without due process of law.

To the Com-
mittee on
Education.
1802
May 8.

In answering the inquiry of the committee on education whether House Bill No. 931, an act to increase the number of feoffees of the grammar school in Ipswich, would be constitutional, it seems proper to state briefly the facts of which I am informed.

In 1650 the town of Ipswich granted to Robert Payne and others a tract of land for the use of school learning in the town forever. Certain citizens also dedicated land to the same purpose, and in 1653 Robert Payne built an edifice for a grammar school at his own expense. In 1683, Robert Payne, being the last survivor of the individual donors, gave a deed of the whole property to a committee and their successors in trust forever. Three of the committee were chosen by the town and two by himself. See *Feoffees of the Grammar School in Ipswich v. Andrews*, 8 Met. 584, 587.

These trustees and their successors continued to act in the performance of their trust without interruption until 1720, when a difficulty arose with the town of Ipswich, which then for the first time laid claim to the land which it had deeded to Robert Payne as having reverted after the death of the original feoffees; but the town lost the suit which it brought to recover the premises.

In 1756 the town passed the following vote: —

Ipswich town-records, vol. 4, p. 153. Att a Meeting Of the Inhabitants of the Town of Ipswich by Adjourn January 22d 1756. Collo John Choate Esq. Moderator of the Meeting

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The Comtee Appointed on the Twelfth Inst to Confer with the Feoffees of the Grammar School in Ipswich Respecting the Management of the School Rents Reported that they had Agreed thereon and then the Town Came into the Following Vote. Vizt —

Whereas the Town in Granting the School Farm att Chebbacco did not give those Persons to whose Trust they Committed the Improvement of Said Farm a power to Appoint Successors as the Private Persons who granted Lands in this Town for the Same use Did as Appears by Examining the Respective Grant by which Means those Grants being Differently Constituted and the Persons Instructed by the Town as Aforesaid being Long Since Dead Endless Disputes may Arise between the Town & Feoffees About the School (to the Support of which the whole Income if needed is to be Applied) Unless Relief be had from the Generall Court and inasmuch as the Present Feoffees have Manifested there Agreement Thereto —

“Voted That a Joynt Application be made to the Great and Generall Court to Obtain and Act if they See meet Fully to Authorize and Impower the Present Four Feoffees and Such Successors as they shall from time to time Appoint in their Stead together with the Three Edest Selectmen of this Town for the time being other than Such Selectman or men as may att any time be of the Four Feoffees To be A Committee in Trust the Major Part of whom to Order the Affairs of the School Land & School Appoint the Schoolmaster from time Demand Receive and Apply the Incomes Agreeable to the True Intent of the Donors No Feoffee hereafter to be Appointed by the Present Feoffees or by their Successors Other than an Inhabitant of this Town and not to Act after he Removes his Dwelling out of it and to have no more than Four att one time and Least any Unforeseen Inconvenience may happen in this Method it is agreed that the Act be only made for Ten Years att First.

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Attest

SAMUEL ROGERS T. Cler—

As a result of the agreement expressed in this vote, the act of 1756, c. 26, was passed, incorporating the seven feoffees, being four on the part of the original donors and three representing the town. This act was an experiment, to be in force only for ten years.

By the act of 1765, c. 5, the Legislature, reciting that it had been found by experience that the previous act had been of great advantage to the interest of learning in the town, and that all doubts and disputes had ceased and the parties concerned

desired the continuance of the act, provided that the four surviving feoffees on the part of the individual donors, together with the three selectmen at that time, should be incorporated feoffees in trust, and that the act should continue in force twenty-one years. Then, by St. 1786, c. 54, the Legislature provided that the act of 1765 be made perpetual.

Again disputes have arisen between the feoffees on the part of individuals and the town of Ipswich. The town has voted to increase its power in the corporation by adding three feoffees, that it may out-vote the representatives of the individual donors six to four, and applies to the Legislature for an act authorizing the change.

In my opinion, the Legislature has no authority to pass the act in question. As a result of the agreement expressed in the vote of the town above recited, the original administration of the trust was materially changed. The balance of power was shifted from the town to the private feoffees, and this contract was made permanent by the statute incorporating the seven feoffees. Under this act the rights of each group of trustees became vested, as also the rights of the beneficiaries under the trust; and any gifts to the charity made thereafter were upon faith that the trust should be administered by trustees in behalf of each group of donors in those proportions. If the bill in question should be passed, it would be void, as impairing the obligation of the contract and destroying vested rights without due process of law. See *Trustees of Dartmouth College v. Woodward*, 4 Wheat. 518; *Allen v. McKeen*, 1 Sumn. 277; *Brown v. Hummel*, 6 Pa. St. 86; *Cary Library v. Bliss*, 151 Mass. 364.

The principle is the same as if the Legislature were to deprive the town of its power in the management, or were to supplant the feoffees by a new committee.

STATE BOARD OF HEALTH — RULES AND REGULATIONS FOR
PROTECTION OF WATER SUPPLY — PUBLICATION — EX-
PENSE.

Under the provisions of R. L., c. 75, § 113, authorizing the State Board of Health to make rules and regulations to secure the sanitary protection of waters used as sources of water supply, it is the duty of such Board to cause the publication of such rules and regulations, and to meet all expenses incidental to such publication.

Replying to the inquiry of your Board under date of April 17, I have to say that, in my opinion, the duty of publishing notice of rules established by your Board for the sanitary protection of the waters for the water supply of Taunton is imposed upon your Board; it appearing that in the latter part of the year 1901 the water commissioners of the city of Taunton petitioned the State Board of Health for the establishment of rules and regulations to prevent pollution and secure sanitary protection for the waters of the Lakeville ponds, they being the water supply of said city. After examination, a set of rules and regulations were prepared by the State Board; and the question has now arisen whether the duty of publishing notice of such rules devolves upon the State Board of Health or upon the city of Taunton.

To the State
Board of
Health.
1902.
May 13.

The authority of the State Board in the premises is conferred by c. 75, § 113, of the Revised Laws, which is a substantial re-enactment of c. 510 of the Acts of 1897. Those provisions are that the State Board may cause examination of such waters (including streams and ponds used for water supply), to ascertain their purity and fitness for domestic use. The Board may further make rules and regulations to prevent the pollution and secure the sanitary protection of all such waters as are used as sources of supply. Presumably the water commissioners of Taunton petitioned the State Board under the provisions of this law.

Section 114 of the Revised Laws, c. 75, provides that the publication of an order, rule or regulation made by the Board under the provisions of § 113 is to be made in a newspaper published

in the city or town in which such order is to take effect; or, if there be no newspaper so published, a copy of the order is to be posted in some public place in such city or town; and that such publication shall be legal notice to all persons. An affidavit thereof is to be made by the person causing such publication, and is to be filed and recorded in the office of the clerk of the city or town, and such affidavit is to be admitted as evidence of the time, place and manner in which the notice is given.

Section 116 of c. 75 provides that said Board may appoint, employ and fix the compensation of such agents, clerks, servants and assistants as is considered necessary; and further provides that such agents and servants shall cause the provisions of law relative to the pollution of water supplies and of the rules and regulations of the Board to be enforced.

Section 117 of the same chapter provides, among other things, that no person shall be required to bear the expense of consultations with or advice or experiments of the State Board in this connection.

The making and promulgation of rules and regulations for the protection of a water supply is a part of the duty of the State Board, and may be invoked by municipalities for their protection. Section 113, before referred to, provides that the Board may make rules and regulations to prevent the pollution and to secure the sanitary protection of such waters. The making and promulgation of these rules is plainly an incident to secure such protection, and is a necessary preliminary to their enforcement.

For these reasons I have reached the opinion which I have above stated, to the effect that the State Board should, under the circumstances, secure the publication of the rules and regulations made by them in the premises; and that this duty does not devolve upon the municipality, nor should any expense incident thereto be charged to the city.

MASSACHUSETTS AGRICULTURAL COLLEGE — FUND DERIVED FROM
PROCEEDS OF SALE OF PUBLIC LANDS — PAYMENT OF IN-
TEREST BY COMMONWEALTH.

The obligation imposed upon the Commonwealth by St. 1863, c. 166, accepting the provisions of the United States statute of June 2, 1862 (12 U. S. St., c. 130), to pay to the Massachusetts Agricultural College interest upon the fund derived from the proceeds of the sale of public lands as therein provided, requires the Commonwealth to pay only such rate of interest as it is reasonably able to obtain by the investment of such fund in safe securities. The whole amount of such interest, once accrued, must be paid without diminution to such college.

You have requested my opinion whether, in view of the United States statute of July 2, 1862 (12 U. S. St., c. 130), and the Massachusetts statute of 1863, c. 166, accepting the provisions of the federal statute, the Commonwealth must pay to the Massachusetts Agricultural College interest upon the fund therein described at the rate of five per cent., or only at such rate as it is possible to obtain.

To the
Auditor.
1902
May 21.

By the statute above cited the United States government granted to the Commonwealth public lands upon condition that all moneys derived from their sale were to be invested in safe stocks, yielding not less than five per cent. on the par value, the money so invested to constitute a perpetual fund, the capital of which should remain forever undiminished, the interest to be inviolably appropriated to the endowment of an agricultural college. The act further provided as follows: "If any portion of the fund invested or any portion of the interest thereon shall, by any action or contingency, be diminished or lost, it shall be replaced by the state, so that the capital of the fund shall remain forever undiminished, and the annual interest shall be regularly applied without diminution to the purposes named." This statute was accepted by the Massachusetts statute of 1863, c. 166, and the beneficiary of the fund, the Massachusetts Agricultural College, was incorporated by St. 1863, c. 220. I am informed that an investment of the fund at so high a rate of interest has now ceased to be possible.

In the first place, the question arises whether the following provision by itself requires the Commonwealth to pay five per

cent. at all events: "If any portion of the fund invested or any portion of the interest thereon shall by any action or contingency be diminished or lost, it shall be replaced by the State, so that the capital of the fund shall remain forever undiminished." I believe that this applies only to a loss of interest which has accrued, — not to a diminution in the rate of interest. This is indicated by the language, "any portion of the interest." Neither is there anything in the language which follows, "the annual interest shall be regularly applied without diminution to the purposes named," to indicate a guaranty that the rate shall not be diminished.

The vital question arises upon the provision that all moneys are to be invested in safe stocks, yielding not less than five per cent. upon the par value. Naturally, this refers not only to the original investments, but, in general, to reinvestments.

It is possible to construe this as a condition that the Commonwealth shall forever invest the fund at five per cent., or pay the difference to the college; but, in my judgment, this is not its true construction. Even if it were an ordinary contract, in which a trustee agreed in similar terms to invest a fund, a fair interpretation of his obligation would not be that he insured forever the stability of high rates of interest. Without express language, one who engages to deliver a specific article does not insure its continued existence, nor does any contractor warrant the permanence of the existing law. *Butterfield v. Byron*, 153 Mass. 517; *Howell v. Coupland*, L. R. 1 Q. B. D. 258; *Stewart v. Stone*, 127 N. Y. 500; *Baily v. De Crespigny*, L. R. 4 Q. B. 180. Upon similar grounds, it is not a reasonable construction of such trustee's contract to say that he guarantees that the business conditions of the last generation shall persist.

In the present case such a construction is even less to be accepted. The obligation of the Commonwealth is not expressed in its own language, but by the acceptance of a grant with a condition annexed. If doubt existed as to the reasonable construction of the condition, it should be resolved in favor of the Commonwealth.

For the above reasons, I am of opinion that the Commonwealth is required to pay only such rate of interest as it is rea-

sonably able to obtain by investment in safe securities, and that the whole of such interest, once accrued, is to be regularly applied without diminution to the Agricultural College.

MILITIA — NAVAL BRIGADE — CITIES AND TOWNS — DUTY TO FURNISH ACCOMMODATIONS FOR BOATS AND EQUIPMENT.

R. L., c. 16 § 105, makes it the duty of cities and towns, within the limits of which portions of the volunteer militia are located, to provide suitable accommodations for the equipment necessary to secure the proper efficiency of such militia; and, if an existing armory is not adequate for the storage of boats and other equipment used by a company of the Naval Brigade, a recognized part of the militia of the Commonwealth, quartered within any city or town, proper accommodations must be supplied by such city or town either within the armory itself or by securing suitable buildings elsewhere.

I beg to acknowledge the receipt of your inquiry of June 19, relating to the duty imposed upon cities and towns by the provisions of R. L., c. 16, § 105, of maintaining suitable armories for the volunteer militia for drill and for the safe-keeping of military property.

To the
Adjutant-
General.
1902
July 14.

The specific question upon which you desire my opinion is as follows: "The Naval Brigade being a part of that militia, and boat drills being an important part of their instruction, is it not incumbent, under the law, for cities and towns to provide suitable accommodations for the safe-keeping and storage of boats and equipment, by the erection of boat houses?"

R. L., c. 16, § 105, provides: "The mayor and aldermen and selectmen shall provide for each regiment, battalion, corps of cadets, or portion of the volunteer militia, within the limits of their respective cities and towns, a suitable armory for the purpose of drill and for the safe keeping of the arms, equipments, uniforms and other military property, suitable places for parade, drill and target practice; and a suitable room for the headquarters located within their limits of each brigade, regiment, separate battalion or corps of cadets, for the keeping of books, the transaction of business and the instruction of officers, with necessary fuel and lights, or a reasonable allowance therefor, for each armory or headquarters located within their limits. Any city or town failing to comply with this section shall forfeit to

the use of the commonwealth not more than five thousand dollars."

This section expressly requires cities and towns to provide suitable quarters for bodies of militia which may be within their respective limits; and, as the Naval Brigade forms a recognized part of the militia of the Commonwealth, it becomes the duty of cities and towns where portions of the Naval Brigade are located to furnish suitable accommodations for the equipment necessary to secure the proper efficiency of such militia. I am of opinion, therefore, that, if an existing armory is not adequate to store the boats and equipment used by a company of the Naval Brigade within the limits of any city or town, such accommodations must be provided either within the armory itself or by procuring suitable buildings elsewhere (1 Op. Atty.-Gen. 63).

CORPORATION — EFFECT OF ATTEMPT TO ORGANIZE UNDER REPEALED STATUTE.

An organization formed under the provisions of G. S., c. 61, subsequent to the repeal of such statute by St. 1870, c. 224, but not in compliance with the provisions of the existing law, is not a corporation existing by authority of the laws of this Commonwealth, and therefore is not subject to R. L., cc. 14, 109 and 110.

To the Com-
missioner of
Corporations.
1892
August 7.

In your letter of July 21 you ask whether the Hebron Manufacturing Company of Attleborough is a Massachusetts corporation, and state the following facts: —

Certain persons filed in the office of the town clerk of Attleborough, February 27, 1871, a sworn certificate, dated February 22, 1871, of their organization as a corporation under the above name, "in pursuance of c. 61 of the General Statutes and the acts in addition thereto." No certificate was filed in the office of the Secretary of the Commonwealth, and there is no evidence in his office, or in yours, that such a corporation has ever existed. The company has never made the returns required by law, and has never been taxed as a corporation. The only change in its status since the date of the certificate of organization is in the ownership of shares. It has kept up its organization by the election of officers, and holds itself out to the public as being a corporation.

Had these persons organized in the above manner prior to the repeal of c. 61 of the General Statutes, probably they would be a corporation, notwithstanding their failure to comply with some of the directions in that chapter. See *Merrick v. Reynolds Engine and Governor Company*, 101 Mass. 381. But on May 9, 1870, this chapter of the General Statutes was repealed by St. 1870, c. 224, which provided, in § 1, that the subscribers to a corporation agreement should become a corporation upon complying with the provisions of § 11. The latter section provided for a submission of the certificate of organization and the record to the inspection of the Commissioner of Corporations, and, upon his approval, required that the certificate be filed in the office of the Secretary of the Commonwealth. Since these requirements which the statute provided as express conditions to the creation of a corporation were not observed, I am of opinion that this company is not a corporation existing by authority of our laws, and is therefore not subject to cc. 14, 109 and 110 of the Revised Laws.

Whether it is a *de facto* corporation I have not considered, because it is the duty of officials of the Commonwealth not to recognize as having corporate existence a body of persons against whom it may be expedient for the Commonwealth to proceed by *quo warranto* to oust them from the illegal enjoyment of corporate franchises.

METROPOLITAN PARK COMMISSION — POLICE JURISDICTION OVER
ROADWAYS AND BOULEVARDS — LOCAL POLICE — RIGHT OF
ENTRY.

The police of any city or town have no authority to enter upon roadways or boulevards exclusively controlled by the Metropolitan Park Commission for the general purpose of maintaining the public peace and order within the limits of such roadways or boulevards. The right of local officers of police to enter upon such premises is confined to the pursuit and apprehension of persons who have committed a breach of any statute, ordinance or regulation within the limits of an adjacent city or town, and have taken refuge upon a roadway or boulevard controlled by such commission.

Your letter of July 14 requests my opinion as to the extent of the authority of the police appointed by a city or town within the limits of land taken by the Commonwealth for parkway or

To the Metro-
politan Park
Commission.
1892
August 7.

boulevard purposes in such city or town, under St. 1894, c. 288, the so-called boulevard act.

St. 1894, c. 288, § 3, provides as follows: "In furtherance of the powers herein granted said board may appoint clerks, police and such other employees as it may from time to time find necessary for the purposes of this act, remove the same at pleasure, and make rules and regulations for the government and use of the roadways or boulevards under its care, breaches whereof shall be breaches of the peace, punishable as such in any court having jurisdiction of the same; and in addition said board shall have the same rights and powers and in regard to the roadways or boulevards taken and constructed hereunder as are or may be vested in them in regard to other open spaces by said chapter four hundred and seven and acts in amendment thereof and in addition thereto, and shall have such rights and powers in regard to the same as, in general, counties, cities and towns have over public ways under their control; provided, however, that nothing in this act contained shall be taken or held to affect or abridge the right of any city or town lying within said district to pursue and apprehend, as it lawfully may from time to time, any person or persons who commit within the limit of said city or town any breach of any statute, ordinance or regulation."

St. 1893, c. 407, § 3, provides that the jurisdiction and powers of the Park Commission shall extend to and be exercised within the metropolitan parks district, the limits of which are therein defined.

Section 4 authorizes the commission to preserve and care for the public reservations and open spaces established by it, and further provides that: "In furtherance of the powers herein granted, said board may employ a suitable police force, make rules and regulations for the government and use of the public reservations under their care, and for breaches thereof affix penalties not exceeding twenty dollars for one offence, to be imposed by any court of competent jurisdiction; and, in general, may do all acts needful for the proper execution of the powers and duties granted to and imposed upon said board by the terms of this act."

St. 1895, c. 450, §§ 7, 8 and 9, provide as follows: "Section 7. Said commission shall publish the rules and regulations made by it from time to time. Said publication shall be made at least six times in at least three newspapers printed and published in each county which is wholly or in part within said metropolitan parks district, and such publication shall be sufficient notice to all persons. The sworn certificate of any member of said commission, or of its secretary, that said rules and regulations have been published as herein provided, shall be prima facie evidence thereof. A copy of said rules and regulations, attested by any member of said commission, or by its secretary, shall be prima facie evidence that said rules and regulations have been made by said commission, as provided by law." "Section 8. Whoever violates any rule or regulation lawfully made by said commission shall be punished by a fine not exceeding twenty dollars." "Section 9. The police appointed or employed by said commission in accordance with the provisions of chapter four hundred and seven of the acts of the year eighteen hundred and ninety-three and chapter two hundred and eighty-eight of the acts of the year eighteen hundred and ninety-four shall have all the powers of police officers and constables for the maintenance of the public peace upon any lands, roadways or boulevards under its care, and upon any roadways passing through or bordering upon said lands."

St. 1896, c. 465, § 1, provides that certain exceptions and reservations in takings by the Commonwealth shall be valid, effectual and binding; "but no such grant, agreement, license or arrangement shall be taken or held to abrogate or abridge the control of said board over the land included in said taking except as in said exceptions and reservations provided, or the right of said board from time to time in its discretion to make rules and regulations for the government and use of any roadway, boulevard or crossway, which may at any time hereafter be laid out and maintained over said land or over any portion thereof, not inconsistent with such exceptions and reservations."

Section 2 provides: "Said commission is hereby authorized and empowered to transfer for care and control, including police

protection, any lands or rights or easements or interest in land, although the same be a roadway or boulevard owned or controlled by it, to any city, town or county, or local board of a city or town within the metropolitan parks district, with the consent of such city, town, county or board, and upon such terms and for such period as may be mutually agreed upon, and to enter into an agreement with any such city, town or county or board for the joint care and control or police protection of said land or boulevard, and also for laying out, constructing and maintaining streets or ways into or across any such land or boulevard; and any city, town or county, or any local board within the metropolitan parks district, is hereby authorized and empowered to transfer for care and control, including police protection, any land, rights, easements or interest in land in its control, although the same be already a part of a public street owned or controlled by it, to the metropolitan park commission for such period and upon such terms as may be mutually agreed upon, and to enter into an agreement with said commission for the joint care and control, including police protection, of said land or street."

St. 1897, c. 121, § 3, provides: "The police appointed or employed by said commission, in accordance with the provisions of chapter four hundred and seven of the acts of the year eighteen hundred and ninety-three and chapter two hundred and eighty-eight of the acts of the year eighteen hundred and ninety-four and all acts in amendment thereof and in addition thereto, shall have within the metropolitan parks district all the powers of police officers and constables of cities and towns of this Commonwealth, except the power of serving and executing civil process, and when on duty may carry such weapons as said commission shall authorize."

It is the clear intention of these statutes to vest in the Metropolitan Park Commission the entire care and control of the premises taken for parks, reservations and boulevards, and to make the commission responsible for their preservation and for the maintenance of good order within their limits. With regard to parkways or boulevards, the commission are given all the

powers vested in them in regard to open spaces by St. 1893, c. 407, and, in addition, such rights and powers with regard to the same as, in general, cities and towns have over public ways under their control. All rights and powers previously vested in cities and towns and in the officers thereof are taken away, and the entire control vested in the park commission (1 Op. Atty.-Gen. 588, 590). Their authority over parkways and boulevards, therefore, would seem to be, from the language of St. 1894, c. 288, more extensive than that given them over open spaces taken for park purposes.

As the Metropolitan Park Commission, by virtue of the statutes above quoted, is vested with the complete and exclusive care and control of the roadways, parkways and boulevards under its jurisdiction, it is charged with the preservation of good order thereon, and may create and maintain a police force for the following purposes:—

(1) To enforce the rules and regulations which the commission is authorized to establish over parkways and boulevards within its care and control. This enforcement is exclusively confided to the Metropolitan Park Commission, except where the commission has transferred, under the provisions of St. 1896, c. 465, the care and control of such places to city or town authorities, or has entered upon an agreement with any city or town for the joint control thereof.

(2) To maintain the public peace upon roadways or boulevards controlled by the commission, and upon any roadways passing through or bordering upon the same. The duty of enforcing the public peace upon such roadways or boulevards rests exclusively upon the commission, with the exception of the transfers or agreements provided for by St. 1896, c. 465; and the metropolitan police are vested with all the powers of police officers or constables (except that of serving civil process), for the purpose of performing their duties not only upon the parkway itself, but throughout the metropolitan district (see St. 1897, c. 121, § 3).

I am, therefore, of the opinion that the maintenance of the public peace and the enforcement of the rules and regulations established by the commission upon all roadways and boulevards

controlled by them is entrusted solely to the commission, except in cases where such control is transferred to or shared with cities and towns under the provisions of St. 1896, c. 465; and that the local police of cities and towns have no authority to enter upon such roadways and boulevards for the purpose of maintaining the peace thereon. It should not be forgotten, however, that the city or town police are expressly authorized to enter upon such places for the purpose of pursuing and arresting persons guilty of offences committed within the limits of any city or town and without the limits of the jurisdiction of the commission.

It follows, therefore, that the authority of the local police to enter upon roadways or boulevards exclusively controlled by the Metropolitan Park Commission is confined to the pursuit and apprehension of persons who have committed a breach of any statute, ordinance or regulation within the limits of an adjacent city or town, and have taken refuge upon such parkway or boulevard; and that they have no authority to enter upon such roadways or boulevards for the general purpose of maintaining the public peace and order within the limits of the roadways and boulevards under the jurisdiction of the commission.

EXTRADITION — GOVERNOR — EXECUTIVE DISCRETION — EXPEDIENCY.

The right of the Governor of this Commonwealth to consider questions of expediency or discretion exists only upon applications for requisition issuing from this Commonwealth, or upon demands for the extradition of persons held here in custody to answer for crimes against the Commonwealth, or the United States, or by force of any civil process.

To the
Governor.
1902
August 21.

In the matter of the demand of the Executive of North Carolina for the extradition of Monroe Rogers, an alleged fugitive from the justice of that State, I have the honor to report that, in obedience to Your Excellency's direction, I have heard remonstrants to the honoring of this demand, and the fullest opportunity has been given for the presentation of evidence and arguments in support of the contention raised in behalf of the alleged fugitive.

I have to advise Your Excellency that, in my opinion, all the essential requirements establishing the validity as to matters of form and substance of the demand for extradition, with its accompanying documents, are complied with, and are in accordance with the provisions of the Revised Statutes of the United States, § 5278.

Learned counsel for the alleged fugitive contended that the application for extradition, with its various exhibits and documents, was defective in form, and insufficient in respect to substantive and necessary allegations of fact and law; but, in my opinion, these contentions are not well founded, and must be overruled. If there be error in my conclusion, I am reassured, and the rights of the prisoner are amply protected, since he may invoke the aid of courts having competent jurisdiction, upon a writ of *habeas corpus*, to review and revise this determination of issues of law.

I am further forced to the conclusion that, under the provisions of the Constitution of the United States and the statutes founded thereon, Your Excellency is required to honor the requisition. The counsel and citizens who have interested themselves in the important considerations raised by this case very earnestly and forcibly urged, even insisted, that, under § 12 of c. 217 of the Revised Laws of Massachusetts, it is my duty, under the responsibility imposed upon me, to consider and advise Your Excellency not only as to the law of the case, but, as well, as to the expediency of Your Excellency's favorable action upon the demand of the Executive of North Carolina.

I am of opinion, however, that my investigation must be confined to the legal aspects of the case, and that Your Excellency's action must be controlled by the requirements of the Constitution and statutes of the United States, and that the Massachusetts statutes cannot be operative except in so far as is consistent with the federal law. Upon this view, the right of Your Excellency to consider questions of expediency or discretion exists only upon applications for requisition going from this Commonwealth, or upon demands for persons held here in custody to answer for crimes against this Commonwealth, or the United States, or by force of any civil process.

These considerations seem to me conclusive, and require that Your Excellency honor the requisition from North Carolina.

Giving the widest latitude to the inquiry upon this issue of expediency or discretion raised by the respondent, and for the purpose of giving full consideration to the question of the right of Your Excellency to exercise discretion in your official action, I heard arguments and statements tending, as the remonstrants claimed, to justify or to require Your Excellency, upon this issue of expediency or discretion, to refuse the rendition of the prisoner upon extradition. The remonstrants offered as evidence printed statements from newspapers published in southern States and in the State of North Carolina, and declarations made upon hearsay, tending to show that mob violence prevailed in that State to such an extent and so universally as to compel the conclusion that no negro accused of crime could or would have a fair trial according to law in any southern State, and that he would, if returned upon this requisition, be made the victim of the lawless violence of a mob.

Accepting the contention of the remonstrants, that Your Excellency has discretion to honor or deny the extradition, and that executive or judicial discretion cannot be revised by any other tribunal, but rests upon the responsibility of him authorized to exercise it, it is, nevertheless, true that the field within which such discretion may be exercised must be determined by established principles of law as to the competency of the evidence submitted for its exercise.

Upon these considerations, I must advise Your Excellency that no competent evidence was offered establishing or tending to show any conditions affecting or overcoming the presumption of law, borne upon the application for extradition itself, that the alleged fugitive, if returned, will be dealt with according to law. The presumption obtains and remains until overcome by competent evidence, that the allegations, assurances and pledges contained in the application are made in good faith and for the purpose declared; namely, to insure a trial of the alleged fugitive in the only courts having jurisdiction of the alleged crime, in accordance with the principles of law. I am of the opinion, however, that, even if Your Excellency is to assume that the evidence

offered as such was competent, and did tend to show a lawless condition in North Carolina, and the inability of the lawful authorities to secure a fair trial to the alleged fugitive, still, I am compelled to declare that I know of no tribunal within this Commonwealth, and none that can be established even by Your Excellency, that has jurisdiction to try this question of fact, or before which the sovereign State of North Carolina could be required to appear as petitioner or respondent.

But, again, even resolving all these questions in favor of the contention of the remonstrants, and considering the issue as one of expediency or discretion under the statutes of this Commonwealth, I am compelled to suggest, if it be within my province, that Your Excellency might well hesitate to refuse the rendition of this alleged fugitive, for the reasons urged by the remonstrants; for such refusal upon such grounds would be tantamount, as it seems to me, to declaring that the State of Massachusetts offers itself as a sanctuary where persons charged with crime, fleeing from the southern States, may secure immunity from punishment if guilty; for certain it is, they could not here be tried or punished. None can doubt the necessity or the justice of those laws which are enacted, and which officials must enforce, to protect the community whose interests are intrusted to them from the invasion or infection of fugitives or immigrants justly charged with, or guilty of, the commission of crime; nor is the consideration unworthy of notice, that the attitude of this Commonwealth, apparently or avowedly offering such sanctuary to escaped criminals, could not fail to encourage, because of this hoped-for immunity, the perpetration of crime in a sister State. For these reasons, which I respectfully submit to Your Excellency, I am of the opinion that, upon any view of discretion or expediency, upon grounds presented by the remonstrants your executive duty requires the honoring of this requisition.

There is, among the documents submitted for my examination, and at Your Excellency's suggestion by me made known to the remonstrants, a letter to Your Excellency from the Governor of the State of North Carolina, in express and unequivocal terms declaring (indeed, promising Your Excellency), upon the faith

of the Executive himself and of the State he represents, safety from violence and a fair trial to the accused, if he be rendered in accordance with the demand for extradition. This communication I do not consider as evidence supporting or re-enforcing the pledges and obligations in law set forth in the demand for extradition itself; but it is significant and important, as tending, rightfully and conclusively, in my opinion, to allay any reasonable fear of violence or lawlessness that might be entertained by the alleged fugitive or by his friends. And in this connection I cite a case referred to by the learned counsel for the prisoner, and confidently relied upon by him as supporting his contention, that in the exercise of Your Excellency's discretion the extradition should be denied.

The opinion does not present the decision of any court of last appeal, but is a *nisi prius* opinion of a justice of the court of common pleas in the State of Ohio, and is in the matter of one Hampton, an alleged fugitive from Kentucky. The learned justice, in discussing the issues raised upon a writ of *habeas corpus*, construes the rights and duties of an executive or of a court as to matters of discretion concerning the rendition of the fugitive more liberally than elsewhere, so far as I know expressed by any judicial authority. But it is exceedingly significant that even in this case the learned justice comments upon the fact that there was before him evidence tending to rebut the presumption of good faith, raised by the demand for extradition itself. The court uses this language: "If these extradition proceedings had been regular as to form, had by duly authenticated court records charged a crime, and the proof established that he was a fugitive from justice, it would be my duty to remand the prisoner to the sheriff for delivery to the agent of the demanding State, save as I have said, for the proof before me that he cannot securely take back and keep him safe for trial by law. I therefore asked him to get me the assurance of the trial judge, who reasonably would know the state of feeling and the probabilities of safety locally, and of the Governor of the State as the head of the executive power thereof, and amply able, if forewarned, to protect the prisoner from violence."

The earnest and convincing declarations of His Excellency the Governor of North Carolina, submitted in this case, would compel, even under the authority of the case cited by the remonstrants, the rendition of this alleged fugitive. If the evidence offered in the case before me tended to rebut or overcome this presumption of good faith set forth in the requisition, Your Excellency must, as I believe, accept, both upon the presumptions of law and under the fixed principle of comity between States, and upon the good faith that must attend the declaration of the Governor of North Carolina, assume, and act upon the assumption, that the rendition of the alleged fugitive is sought only for the purpose of trying him in accordance with law; and that the State of North Carolina both can and will secure the personal safety of the prisoner as against any power save that of the law he is said to have violated.

LEGACY TAX ACT — POSTPONEMENT OF TAX — NON-RESIDENT
DECEDENTS — INTERVENING LIFE ESTATE.

The provisions of St. 1902, c. 473, are not applicable to the estates of non-resident decedents.

The statute postpones the time when the legacy tax shall become due upon a taxable remainder until the time when such remainder vests in the remainderman, without reference to the character of the life estate which precedes it.

By a communication dated August 6, you request my opinion upon certain questions with regard to the construction of St. 1902, c. 473. The act is as follows: "Section 1. In all cases where there has been or shall be a devise, descent or bequest to collateral relatives or strangers to the blood, liable to collateral inheritance tax, to take effect in possession or come into actual enjoyment after the expiration of one or more life estates or a term of years, the tax on such property shall not be payable nor interest begin to run thereon until the person or persons entitled thereto shall come into actual possession of such property, and the tax thereon shall be assessed upon the value of the property at the time when the right of possession accrues to the person

To the
Treasurer
and Receiver-
General.
1902
August 26.

entitled thereto as aforesaid, and such person or persons shall pay the tax upon coming into possession of such property. The executor or administrator of the decedent's estate may settle his account in the probate court without being liable for said tax: *provided*, that such person or persons may pay the tax at any time prior to their coming into possession, and in such cases the tax shall be assessed on the value of the estate at the time of the payment of the tax, after deducting the value of the life estate or estates for years; and *provided, further*, that the tax on real estate shall remain a lien on the real estate on which the same is chargeable until it is paid." "Section 2. This act shall take effect upon its passage."

You ask, first, does St. 1902, c. 473, entitled "An act relative to taxes upon collateral legacies and successions," apply to the estates of non-resident decedents; and, second, is said statute applicable to estates of resident decedents in cases where the intervening life estate is taxable?

The first question is not free from difficulty. The statute does not in terms distinguish between the estates of resident and non-resident decedents, and there is much force in the contention that no such distinction was contemplated by the Legislature in its enactment. It will result, however, if the act is construed to include the estates of non-resident decedents, that the existing law relating to the taxation of collateral legacies and successions will become practically inoperative or at least ineffective in every case where personal property of a non-resident decedent, which may be within the jurisdiction of the Commonwealth, vests in or comes into the actual possession of a collateral relative or stranger to the blood liable to the collateral inheritance tax, after the expiration of one or more life estates, and both the property and the legatee in whom it vests are beyond the limits of the Commonwealth.

In view of what I deem to be the purpose of the statute, I cannot believe that the legislature intended by implication to effect so radical a change in the existing law. The undoubted object of St. 1902, c. 473, was not to disturb the ultimate liability of taxable persons and its enforcement, as at present fixed under

the collateral inheritance tax law, but to revise or amend the law only so far as relates to the time when such liability shall in certain cases accrue. Upon this construction of the statute I am forced to take the view that it does not serve to postpone the time when the tax shall be due and payable, where there has been a devise, descent or bequest, consisting of property in this Commonwealth belonging to a non-resident, which vests or takes effect in possession in the future; and that your first question must be answered in the negative.

This conclusion receives confirmation from the language of the act itself. The statute provides that "The executor or administrator of the decedent's estate may settle his account in the probate court without being liable for said tax," a provision which can only apply to the estates of resident decedents, since the executor or administrator of a non-resident decedent is not required to file an account in the probate court of this Commonwealth, but may receive the property of the decedent which may be within the jurisdiction of the Commonwealth, upon the allowance by the court of the petition required by R. L., c. 148, § 3 (see R. L., c. 15, §§ 12, 13 and 14), if it appears that such executor or administrator is, in the State where he is appointed, liable for the property so received. This language, therefore, supports the conclusion that the provisions of St. 1902, c. 473, can only apply to estates the executors or administrators of which are compelled to file an account in the probate courts of this Commonwealth.

To your second question I am of opinion that I must reply in the affirmative. Neither the purpose nor the language of the act can be construed to warrant a distinction between an intervening life estate which is taxable and one which is not taxable. The statute clearly postpones the time when the tax shall become due upon a taxable remainder to the time when such remainder vests in the remainderman, without reference to the character of the life estate which precedes it.

**METROPOLITAN PARK COMMISSION — BUSINESS OF COMMON
VICTUALLER — LICENSE FROM LOCAL AUTHORITIES.**

The Metropolitan Park Commission is not authorized to conduct, through employees, a common victualler's business on land taken by such commission, without first obtaining a license therefor from the authorities of the city or town within the limits of which such land is situated, nor can a lessee of the Commonwealth conduct such business on land so taken without a license from the local authorities.

To the Metro-
politan Park
Commission.
1902
September 4.

In answer to your inquiry in behalf of the Metropolitan Park Commission, stated as follows, I transmit my opinion hereinafter set forth. The inquiry is, whether the commission, through its employees, may conduct a common victualler's business on land taken by this commission, without first obtaining a license from the city or town in which the lands are situated; and also whether a licensee of the Commonwealth, through this commission, may carry on the business of a common victualler on lands taken by this commission for parks or parkways, without license from the city or town within which the business is so carried on.

In previous cases the Attorney-General has decided that the Commonwealth, in the care of its own property, is not subject to the regulations of general legislation respecting similar property owned by individuals. Thus, the elevators of the State House are not to be inspected by the officials of the city.

The just effect of this doctrine is strikingly apparent in case the rule is made not by the Legislature, but by a subordinate body, like the board of health of a town. It is presumed that a town board of health, by its regulations concerning plumbing, may not prescribe the plumbing of a building within the town which is under the care and control of State officials (1 Op. Atty.-Gen. 290, 297).

So, where the Commonwealth has expressly delegated the performance of certain work to its own agents, they are not subject to the direction or control of local officials. The Governor and Council building the State House park are not required to obtain a permit from the street commissioner of Boston before digging in the streets. Otherwise, confusion might result in case

the street commissioner should refuse the permit, and a public work conducted by and in the name of the Commonwealth be delayed, if not entirely suspended.

So the metropolitan park police, being expressly empowered, have exclusive jurisdiction of offences committed in their territorial district.

On the other hand, a dog, though he chances to be the property of the Commonwealth, must be licensed (1 Op. Atty.-Gen. 300). And agents of the Commonwealth carrying swill through the streets of a town must conform to the rules of the local board of health (1 Op. Atty.-Gen. 299).

In every case we are to seek the intention of the Legislature. When it has given the care and control of property to certain agents, it is not reasonable to suppose that it intends them to be interfered with by other officials. When it expressly requires a certain act to be done upon the property of the Commonwealth by its agents, in general it does not intend that act to be subject to the restrictions which would attach to its doing by an individual as a personal matter. For example, in the present question, if the Legislature definitely required the Park Commission to maintain a common victualler's stand on the reservation, we would be forced to conclude that it did not intend to make its maintenance depend upon the contingency of a license from local authorities. An agent of the Park Commission, then, carrying on such business, might, if prosecuted under the general law, as assuming to be a common victualler without a license from the city, justify himself under the express requirement of the special act, else the Commonwealth might be in the position of requiring its agents to first obtain a license from a board over whose authority the commission had no control.

But here no express provision has been made for the refreshment of persons resorting to the metropolitan parks. I find no authority given any officials of the Commonwealth to undertake such a business, nor is any such obligation imposed upon them. The Board has power "to make available to the inhabitants of the district open spaces for exercise and recreation," to make rules and regulations for their government and use, and, in gen-

eral, to do all acts needful for the proper execution of its duties (St. 1893, c. 407, § 4).

In the absence of more specific power or duty in the premises delegated to or imposed upon the Park Commission, it is my opinion that the management of a common victualler's business remains as regulated and controlled by general legislation; and that one conducting such business without a license from the local authorities could not plead successfully that no such license was required for his justification, because he was an agent of the Park Commission, helping to make the park available to the public for recreation.

In St. 1897, c. 207, it is provided that no liquor license shall be granted to be exercised in any public reservation. From this it would appear that the Legislature did not contemplate the sale of liquor by unlicensed agents of the Commonwealth; yet, if the Park Commission can cause ice cream to be sold in parks by an unlicensed agent, it may sell intoxicating liquors as well in the same manner.

My conclusions as above set forth apply with even greater force to your question relating to the authority or immunity of a lessee of the Commonwealth. I can conceive of no possible ground under which such lessee could conduct the business of a common victualler upon land of the Commonwealth without the license by law required to justify the maintenance of such business.

STATE HIGHWAY — ABANDONMENT — EXISTING HIGHWAY.

The State Highway Commission has no authority to abandon any portion of an existing State highway, or to surrender such highway to a city or town.

The abandonment contemplated in R. L., c. 47, § 8, may be made only in the case of lands or rights in lands taken by eminent domain, but upon which no State highway has been constructed or dedicated to public use.

To the Massa-
chusetts
Highway
Commission.
1902
September 6.

I beg to acknowledge a request of the Massachusetts Highway Commission for my opinion as to whether that commission has authority, under R. L., c. 47, § 8, or under any other legal provision, to abandon an entire highway and surrender the same to

a town, the issue being presented by a petition addressed to the Highway Commission by the selectmen of Watertown, the petition being as follows:—

To the Honorable the Massachusetts Highway Commission.

The undersigned, the selectmen of the town of Watertown, respectfully request your honorable Board to abandon and surrender to said town that part of Main Street in Watertown which has been heretofore laid out and constructed as a State highway, so that after such abandonment and surrender this highway shall be kept in good repair and condition by the town and shall be under the sole control of the town, and the Commonwealth shall be relieved from all expense and liability on account thereof.

JAMES H. L. COON,

JOSEPH P. KEEFE,

A. L. RICHARDS,

Selectmen of Watertown.

Section 6 of c. 47 of the Revised Laws, making provision for the exercise of the authority conferred upon the Board to lay out and take charge of State highways, after defining the preliminaries for the exercise of this authority and referring to the adoption of a way as a State highway, the law requires that "thereafter it [such highway] shall be a state highway, and shall be constructed and kept in good repair and condition by the commission, at the expense of the commonwealth," thereby fixing the status of such way permanently as a State highway.

I am of opinion, therefore, that the commission may not abandon a State highway or surrender it to a town as prayed for by the selectmen of Watertown.

My attention is called to § 8 of c. 47 of the Revised Laws: "Said commission may, with the concurrence of the mayor and aldermen of a city or the selectmen of a town, abandon any land or part thereof, or rights in land which have been taken or acquired by it in such city or town by executing, acknowledging and recording a deed thereof accompanied by a plan of survey which shall be recorded therewith. Said abandonment shall revert the title to the land or rights abandoned in the persons, their heirs and assigns, in whom it was vested at the time of the

taking, and may be pleaded in reduction of damages in any suit therefor on account of such taking;" but I am of opinion that this section does not authorize or even contemplate the abandonment of State highways as such, after they have been located and constructed in accordance with the provisions of that chapter.

Section 8 of c. 47 does not authorize the abandonment of land or rights in land within the location of a highway after the same has been established and constructed and committed to the charge of the commission for the Commonwealth; the abandonment contemplated in § 8 may only be made of lands or rights in lands taken, but on which no State highway has been located, constructed or dedicated to the public use.

EXTRADITION — STATE OFFICER — DUTY TO NOTIFY FUGITIVE
OF RIGHT TO APPLY FOR WRIT OF HABEAS CORPUS —
EXPENSES.

1. An officer serving a warrant for the rendition of a fugitive from justice, issued by the Governor of this Commonwealth, is not required by law to inform such fugitive as to his right to apply for a writ of *habeas corpus*. It would be well, however, for the officer in each case to inform the party so arrested that this right is open to him.
2. All expenses of a State officer incidental to the transportation and delivery of a person held as a fugitive from justice must be borne by the agent of the demanding State, including reasonable and proper expenditures for hotel bills and railroad fares.

To the Chief
of the Massa-
chusetts Dis-
trict Police.
1902
September 12.

You submit to me for my opinion two questions. First, is an officer serving the warrant for the rendition of a fugitive issued by the Governor of this State upon a requisition obliged to inform the person arrested that he has a right to apply for a writ of *habeas corpus* under R. L., c. 217, § 14?

In answer to this inquiry, I advise you that the officer is not required by law to inform the person under arrest of his right to apply for a writ of *habeas corpus*, though he must give the person arrested opportunity to make such application. I am, nevertheless, of the opinion that it would be well always for the officer to specifically inform the party so arrested that this right is open to him. Ordinarily, the duty of an officer is fully discharged

when he makes service of his precept in strict accordance with its direction and authority. He is not required to offer advice as to the legal rights of the person upon whom he makes service; indeed, the offer of such advice might often result in serious embarrassment to the officer, if, in the effort to construe the precept and its legal effect, he was in error as to a matter of fact or law.

Your second question is phrased as follows: Is the agent who makes the demand obliged to pay all the expenses of the officer who serves the Governor's warrant, such as railroad fares and hotel bills to and from the State line?

I call your attention to § 13 of the chapter of the Revised Laws above referred to: "If the governor is satisfied that the demand conforms to law and ought to be complied with, he shall issue his warrant, under the seal of the commonwealth, to an officer authorized to serve warrants in criminal cases, directing him at the expense of the agent who makes the demand, . . . to take and transport such person to the boundary line of this commonwealth and there deliver him to such agent."

Under this express provision, it is clear that all expenses of the State officer incidental to the transportation and delivery of the person held are to be borne by the agent of the demanding State. Within such expenses, proper and necessary expenditures for hotel bills and railroad fares of the State officer are to be included.

INSURANCE — ANNUAL RETURNS OF INSURANCE COMPANIES — PUBLIC DOCUMENTS.

Annual statements of insurance companies, filed in the office of the Insurance Commissioner, according to the provisions of R. L., c. 118, § 96, are papers which the Insurance Commissioner is by law required to receive for filing within the intention of R. L., c. 35, § 5, and are therefore open to inspection as public documents.

I am advised by you that a question has arisen in the insurance department upon which you desire my opinion, the inquiry, as stated to me, being whether the annual statements made by

To the Insurance Commissioner.
1902
September 22.

insurance companies under the provisions of R. L., c. 118, § 96, are public records, open to the inspection of any citizen.

Section 96 is as follows: "Every insurance company shall annually, on or before the fifteenth day of January, file in the office of the insurance commissioner a statement which shall exhibit its financial condition on the thirty-first day of December of the previous year, and its business of that year. For cause the commissioner may extend the time within which any such statement may be filed, but not to a date later than the fifteenth day of February. Such annual statement shall be in the form required by the insurance commissioner. He shall embody therein, so far as appropriate to the several companies, the substance of the appended forms, with any additional inquiries he may require for the purpose of eliciting a complete and accurate exhibit of the conditions and transactions of the companies. The assets and liabilities shall be computed and allowed in such statement in accordance with the rules stated in section eleven. Such statement shall be subscribed and sworn to by the president and secretary, or, in their absence, by two of its principal officers. The annual statement of a company of a foreign country shall embrace only its business and condition in the United States, and shall be subscribed and sworn to by its resident manager or principal representative in charge of its American business. For filing each annual statement each foreign company shall pay to the commonwealth twenty dollars. The transaction of any new business by any company or its agents which has failed to file a statement in the manner herein provided shall, after notice to that effect from the insurance commissioner, be unlawful while such default continues."

R. L., c. 35, § 5, provides: "In construing the provisions of this chapter and other statutes, the words 'public records' shall, unless a contrary intention clearly appears, mean any written or printed book or paper . . . which any officer or employee of the commonwealth or of a county, city or town has received or is required to receive for filing."

This legislative definition cannot be held to include within its

intention every paper which an officer of the Commonwealth receives and files. It must be limited to such as he is required by law to so receive for filing. Any other construction must be prejudicial to the rights and interests of the Commonwealth or its officers, and indeed, of parties or persons making communications with such officers.

The original act for which the provision of the Revised Laws is a substitute (St. 1897, c. 439, § 1) called a public record any paper which a public officer is required by law to receive, or in pursuance of any such requirement has received for filing. The compilers of the Revised Laws have not preserved the distinction between a paper which an officer is required by law to receive and one which he receives for his own convenience. The existing qualification for the purpose of definition makes a test of the requirement to receive for filing, and any paper so received falls within the definition of a public record.

The question you submit to me is necessarily narrowed, therefore, to this: whether an annual statement of an insurance company, filed in the office of the commissioner, under § 96, c. 118 of the Revised Laws, is a paper which the Insurance Commissioner is required by law to receive for filing within the intention of the statute; and I am of the opinion that it is such, and, as such, open to the inspection of any citizen, under the provisions of § 17 of c. 35 of the Revised Laws.

WACHUSETT MOUNTAIN STATE RESERVATION — SPECIFIC APPROPRIATION — UNEXPENDED BALANCE.

The purpose of the appropriation under St. 1901, c. 496, was expressly limited to the acquisition of land and the construction and repair of the roadway on the Wachusett Mountain State reservation, and an unexpended balance remaining therefrom may not be expended for the erection of a house for the use of the superintendent of such reservation.

Confirming my oral statement to you, I now have to say, in answer to your question submitted July 14, inquiring whether your commission may lawfully apply any balance that may be left, after purchasing land under authority of c. 496 of the Acts

To the
Wachusett
Mountain State
Reservation
Commission.
1902
September 22.

of 1901, to the construction of a house for the use of the superintendent of the reservation: —

This commission was established by c. 378 of the Acts of 1899: "Section 4. The commission shall have the same powers to acquire lands for the Wachusett Mountain state reservation which are given to the metropolitan park commission, established by chapter four hundred and seven of the acts of the year eighteen hundred and ninety-three, and acts in amendment thereof or supplementary thereto, and shall be vested with full power and authority to care for, protect and maintain the same in behalf of the Commonwealth." "Section 5. The necessary expense for care and maintenance of the Wachusett Mountain state reservation, in excess of any income that may be derived therefrom, shall be annually estimated by the Wachusett Mountain state reservation commission, and shall be embodied by the county commissioners of the county of Worcester in the estimate annually submitted by them to the general court, and shall be assessed upon said county and collected in the same manner as are county taxes."

Under this act \$25,000 were appropriated to carry out its provisions. Chapter 496 of the Acts of the year 1901 made a further appropriation of \$25,000, "to be expended by said commission for the purpose of acquiring, by purchase or otherwise, such land adjoining the present Wachusett Mountain state reservation as the commission may deem it necessary or advisable to acquire, and for the purpose of putting in safe and suitable condition the mountain roadway on the reservation."

Section 2 gives to the commission the same powers over lands acquired under this act as are given them over lands previously acquired under c. 378 of the Acts of the year 1899. Section 3 provides that the necessary expense for the care and maintenance of the additional land acquired shall be paid by the county of Worcester in the manner provided by said statute of 1899.

The purposes for which the \$25,000 appropriated by the statutes of 1901 may be expended are expressly limited to the acquisition of land and the construction and repair of the roadway on the reservation. It would seem, therefore, that the com-

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mission is not authorized to use any unexpended balance of such appropriation for the construction of a house for the use of the superintendent, this being an expenditure which cannot properly be included under either of the designated purposes for which the moneys were appropriated by the State. Whether there may be any other source, by appropriation or otherwise, from which the funds necessary for the construction of a house for the superintendent may be secured, I express no opinion, since that inquiry is not addressed to me; but I am clearly of the opinion that the commission is not authorized to use the unexpended balance of the sum appropriated by the act of 1901 for the purpose suggested, namely, the erection of a house for the superintendent of the reservation.

STATE HIGHWAY — POSTING OF NOTICES — PUBLIC SHADE TREES.

The Massachusetts Highway Commission has no authority, under existing laws, to affix to public shade trees, located within the limits of a State highway, notices warning the public against the injury or defacement of such trees.

The Massachusetts Highway Commission requests the opinion of the Attorney-General as to whether or not that commission has the right, under the statutes relating to its work, to post notices upon trees located on State highways, warning the public against the injury or defacement of such trees.

To the Massachusetts Highway Commission.
1902
October 7.

R. L., c. 208, § 104, is general in terms, and applies to shade trees upon public ways. I am of opinion that it includes those upon State highways, and that the local tree wardens necessarily have jurisdiction over them, excepting so far as the statutes defining the duties of the Highway Commission are inconsistent therewith. The question you submit, therefore, must be determined by a consideration of the authority over public shade trees given to your commission, if at all, by those statutes which define the duties and powers of the Highway Commission.

Chapter 47, § 21, of the Revised Laws, provides that "no shade trees shall be planted or removed or obstruction placed

thereon, without the written permit of the highway commission, and then only in accordance with the regulations of said commission."

Section 11 of c. 47 authorizes the commission to cause suitable trees to be planted, and to keep the highway reasonably clear of brush.

Neither of these statutes can be construed to authorize the commission to violate the provisions of c. 208, § 104, of the Revised Laws, which relates to affixing notices upon public shade trees; and the affixing of such notice, even by your Board, does, technically, in my opinion, violate the letter if not the spirit of that law.

I am therefore of the opinion that your Board has no authority to affix any notices upon shade trees. It would seem that the wiser course would be to secure the formal assent or approval of the local tree warden to the posting of such notices as you think the protection of the trees require, and with this approval you could accomplish the end sought for, and be within the technical restrictions of the law.

I am further of the opinion that the state of the law, which seems to prohibit your taking the initiative in the matter, is the result of omission rather than design; for I cannot doubt that, had the Legislature dealt directly with the question, it would have conferred upon your Board this power, which is so plainly incident to the complete discharge of your duties with regard to the maintenance and preservation of the State highways.

FIRE MARSHAL'S DEPARTMENT — HEARINGS — EXCLUSION OF PUBLIC.

The deputy in charge of the Fire Marshal's department of the District Police may exclude from a hearing conducted by him, for the purpose of ascertaining the cause of a fire, all persons other than those summoned to give testimony.

To the Chief
of the Massachusetts
District Police.
1902
October 7.

You require the opinion of the Attorney-General upon the question whether the deputy in charge of the Fire Marshal's department of the District Police has the power to exclude from

a hearing conducted by him any persons, including counsel, while an inquest is being held to ascertain the cause of a fire.

R. L., c. 32, § 3, provides that, for certain purposes, "the fire marshal or his deputy may summon and examine on oath any person supposed to know or have means of knowing any material facts touching the subject of investigation. Such witnesses may be kept apart and examined separately and such examination shall be reduced to writing, and false swearing therein shall be deemed perjury and be punishable as such. Any justice of the municipal court of the city of Boston, or of the superior court, upon application of the fire marshal or his deputy, may compel the attendance of such witnesses and the giving of such testimony before the fire marshal or his deputy in the same manner and to the same extent as before said courts respectively."

This provision was not affected by St. 1902, c. 142, which was an act transferring the powers and duties of the State Fire Marshal to the Massachusetts District Police. The original statute establishing the office of State Fire Marshal (St. 1894, c. 444), expressly repealed by R. L., c. 227, provided, in § 4, that "all investigations held by or under the direction of the state fire marshal may in his discretion be private, and persons other than those required to be present by the provisions of this act may be excluded from the place where such investigation is held, and witnesses may be kept separate and apart from each other and not allowed to communicate with each other until they have been examined." This provision was not re-enacted in R. L., c. 32, § 3, above cited; but I am of opinion that, notwithstanding its omission, the deputy may still exclude from the room persons other than those summoned to give testimony during the progress of the inquest, and may examine persons so summoned separately, and in the absence of all persons except those officers who are themselves conducting the inquiry under the law. The omission of the specific provision contained in the earlier statute is not, in my opinion, conclusive as to the existing law. It may well be that the clause was omitted as being unnecessary, in that the tribunal, without express statutory authority, could have excluded witnesses and persons.

An inquest is not such a proceeding as confers upon parties summoned to appear the right to be there represented by counsel. It is not a trial, but an inquiry. It seems to be well established that in coroners' inquests no person is entitled, by reason of being suspected of causing the death, to be present or to have counsel, or to cross-examine the witnesses or produce others. This proceeding before the Fire Marshal is not essentially different from a coroner's inquest; and, having in view the purpose of the inquiry and the general method of procedure followed in similar cases, I am of opinion that the fact that the provision giving the Fire Marshal discretion to make such hearing private was omitted from the Revised Laws is not sufficient ground for holding that the Fire Marshal, under existing laws, may not make such hearing private.

STREET RAILWAY — EMPLOYEES — HOURS OF LABOR — "DAY'S WORK."

A special contract made by a street railway company and its employees, providing for employment and compensation by the hour, and not aggregating the service under the designation of a "day's work," as a unit, is not within the provisions of R. L., c. 106, § 22, setting forth what shall constitute a day's work for all conductors, drivers and motormen employed by street railway companies.

To the Chief
of the Massa-
chusetts Dis-
trict Police.
1902
October 8.

You submit to me three inquiries: "First. A street railway company operating cars in this Commonwealth employ and pay their motormen and conductors by the hour. Does such payment by the hour invalidate that part of § 22, c. 106, Revised Laws, which refers to 'a day's labor'?" The real inquiry is, whether a special contract, made by such company and such employee, providing for employment and compensation by the hour, and not aggregating the service under the designation of a "day's work," as a unit, falls within the prohibition of the section referred to, and is forbidden because in violation of statutory law.

The question raised is an interesting one, and not entirely free from difficulty. But I am clearly of the opinion that an intention, if the Legislature entertained such, to restrict or impair the right

of a citizen to make his own contract is not to be presumed in the absence of express and apt words compelling that construction. I am of opinion that the term "day's work" is used, and so intended, as a unit representing both the term of labor and the right of compensation for such term. This definition does not prohibit or preclude the making of a special contract which does not adopt such unit as an element of the contract itself, but relates merely to specific employment for specific defined periods of time not referable to the standard of a day's work.

It may be that the Legislature had in mind, by reason of its designation of conductors, drivers and motormen, not merely the rights or the protection of the laborer or employee, but the interests and safety of the public; and that the enactment is based upon the judgment of the Legislature, speaking for the public, that employment in the exacting service of operating electric cars for more than the number of hours limited within the twenty-four would be dangerous to the travelling public, because labor protracted beyond such limited hours would tend to impair, through fatigue, the efficiency of the men to whose care the safety of the travelling public was committed. But this possible occasion for, or intent of, the legislation, does not warrant a construction that would require a new significance to be given to the words "day's work" as a term in a contract. See 1 Op. Atty.-Gen. 10.

Your second inquiry is based upon a statement of facts as follows: "Conductors and motormen are employed in the case cited from 5.30 A.M. to 12 midnight, with a lay-off from 10.45 A.M. to 6.15 P.M., not doing their day's work in twelve consecutive hours." Assuming that such schedule is based upon the special contract above referred to, for the reasons heretofore given I am required to hold that this arrangement is not in violation of the section which I have above cited.

Your third inquiry states that: "A conductor and motorman may work from 5.30 A.M. to 11.50 A.M. and from 5.10 P.M. to 10.30 P.M., making eleven hours and forty minutes of actual platform work, and also exceeding the twelve consecutive hours." Here, again, assuming the existence of the special contract, I

have to say, for the reasons above set forth, that I am of the opinion that this arrangement is permissible, because not in conflict with the provisions of the same section.

PAUPER LAW — MILITARY SETTLEMENT — DESERTION.

A person is not debarred from gaining a settlement under the provisions of R. L., c. 80, § 1, cl. 10, by reason of the fact that he absented himself from his command, and was thereafter found serving with other troops and was returned to his original regiment, where he remained until honorably discharged from the service of the United States, there being no evidence that such person was ever proved guilty of desertion.

To the Super-
intendent of
State Adult
Poor.
1902
October 24.

In a communication dated September 22, you desired my opinion upon a question with regard to the settlement of a pauper under the provisions of R. L., c. 80, § 1, cl. 10.

It appears that the pauper in question "enlisted in Company H, Twenty-ninth Massachusetts Infantry, August 22, 1862, and deserted therefrom on or about the fifteenth day of May, 1864. Under the name of Arthur Bryant he re-enlisted, August 6, 1864, in Company C, Second Infantry, and received a bounty of \$325. On June 28, 1865, he was reclaimed as a deserter and returned to the Twenty-ninth Infantry. He was honorably discharged from the service of the United States on the twenty-ninth day of July, 1865."

It is admitted that the pauper would have gained a settlement under the provisions of this clause unless prevented therefrom by the fact that in May, 1864, he absented himself from his command, and was thereafter found serving with other troops, and was returned to his original regiment, where he remained until he received an honorable discharge.

I am of opinion that he was not so prevented. The statute in terms provides that, if other conditions are fulfilled, a pauper shall lose the benefit of this clause only when he has been *proved guilty* of desertion; and it is not enough that a person claiming settlement by virtue of such provisions was absent from duty or was even arrested for desertion, if there is no evidence that such person was convicted or sentenced therefor. *Fitchburg v.*

Lunenburg, 102 Mass. 358, 361. I am aware of no technical signification which would render the words "reclaimed as a deserter" equivalent to a statement that the person to whom they relate was proved guilty of desertion; and, assuming that they are used in their ordinary sense, I am of opinion that there is no evidence disclosed by the record, as quoted in your letter, that the pauper in question was ever proved guilty of desertion within the meaning of the statute, and that such person is therefore entitled to claim a settlement under the provisions of R. L., c. 80, § 1, cl. 10.

CIVIL SERVICE — RE-EMPLOYMENT OF EMPLOYEE DISCHARGED
BY REASON OF REVISION OF CHARTER OF CITY OF BOSTON
— SPECIFIC EXEMPTION.

St. 1895, c. 449, entitled "An act to revise the charter of the city of Boston," which provides in § 27 that officers and employees of any department of the city whose positions were abolished or whose tenure of office was affected by the act might be appointed to positions in any department of the city without civil service examination or enrolment, serves to exempt from the operation of the civil service law and rules an employee discharged by reason of such revision, although the re-employment of such employee is deferred until seven years after his discharge.

I beg to reply to your communication of October 8, requesting my opinion upon the construction to be given to St. 1895, c. 449, § 27. This statute is entitled "An act to revise the charter of the city of Boston," creating certain departments of the city of Boston, and abolishing or consolidating some of those already existing. Section 27 is as follows: "The officers and employees of any department who may be removed from the service of the city, or whose tenure of office may be affected by the provisions of this act or the carrying out thereof, may be appointed to positions in any department of said city without civil service examination or enrolment."

To the Civil
Service Com-
mission.
1902
November 2.

It appears that, at the time when the statute took effect, one Townsend was, and had been since 1890, employed in the labor division of the water department of Boston, in a branch of the service which was abolished under the provisions of this act. On

August 5, 1902, more than seven years after the discharge of Mr. Townsend, consequent upon the abolition of the department in which he was employed, the present water commissioner of the city of Boston notified the Civil Service Commissioners that he had appointed Townsend an inspector in the water department, a position in the first division of the classified service, without any requisition, examination or certification by the Civil Service Commissioners, claiming to act therein under authority of § 27, above quoted.

Your letter further states that: "The specific question upon these reported facts is, whether William H. Townsend was legally appointed inspector in the water department in August, 1902, solely under and by virtue of § 27 of c. 449 of the Acts of 1895, without requisition or certification."

Although the question is not free from doubt, I am of opinion that the appointment of Townsend was legal under the provisions of St. 1895, c. 449, § 27.

The obvious purpose of § 27 was to provide for the appointment in other departments of officers and employees of the city of Boston who were thrown out of office or employment by the abolition or consolidation of the departments with which they were connected by the legislation of 1895, without subjecting them to the inconvenience and delay of taking a civil service examination, and awaiting their turn for appointment upon the classified lists of the service. The section does not in terms limit the time within which such appointments may be made, and I can see no valid ground for reading such a limitation into the act by implication. If the statute were construed to require, by implication, the immediate appointment to positions in the service of the city of Boston of persons displaced therefrom by St. 1895, c. 449, even allowing a reasonable time for arranging for transfers or re-employment, it would follow that a separate adjudication would be necessary in the case of each appointment to determine what should constitute a reasonable time, under all the circumstances, with the possible result that an adverse conclusion would deprive the person for whose advantage § 27 was enacted of the very benefit which it was intended to confer.

I cannot believe that such was the intent of the Legislature, and I am therefore constrained to advise you that, in my opinion, the appointment of Mr. Townsend as inspector in the water department of the city of Boston was authorized under the provisions of St. 1895, c. 449, § 27, although made without requisition upon or certification by your commission. Upon this view of the question it seems unnecessary to reply to the general inquiries submitted.

FIREMEN'S RELIEF FUND — AID TO WIDOWS OF DECEASED FIREMEN.

The Board of Commissioners of the Firemen's Relief Fund is authorized under existing statutes to discontinue the allowance of \$400 established by such Board to widows of deceased firemen, under the provisions of St. 1892, c. 177, in view of the payment of \$1,000 designated and established for such purpose by R. L., c. 32, § 77.

You desire the opinion of this department upon the question "whether it is obligatory to pay to the widows of deceased firemen killed in the service anything in addition to the amount now granted to minor children." You state that, in accordance with the provisions of § 77 of c. 32 of the Revised Laws, an allowance of \$2 per week is given to such children under sixteen years of age; and that, prior to the enactment of the statute authorizing the State Treasurer to pay \$1,000 to widows or dependents, under § 32 of above cited chapter of the Revised Laws, your Board has allowed \$400 for death claims, \$100 of which was for funeral expenses; and you further state that since the later enactment your Board has discontinued the death allowance of \$400.

R. L., c. 32, §§ 71-77, inclusive, contain provisions relating to the firemen's relief fund, § 71 providing that the sum of \$10,000 shall be paid by the Treasurer of the Commonwealth to the treasurer of the association, from money received from taxes on fire insurance companies doing business in this Commonwealth, and that such sum shall be known as the firemen's relief fund of Massachusetts.

Sections 73, 74 and 77 of said chapter provide as follows: "Section 73. Such fund shall be used for the relief of firemen,

To the Board
of Commis-
sioners of the
Firemen's
Relief Fund.
1902
November 7.

whether members of said association or not, who may be injured in the performance of their duty at a fire or in going to or returning from the same, and for the relief of the widows and children of firemen killed in the performance of such duty, in the manner and to the amount determined by a board of five persons, three of whom, not members of said association, shall be appointed by the governor, and two of whom shall be appointed by said association." "Section 74. Officers and members in active service in all incorporated protective departments co-operating with fire departments, and any person performing the duties of a fireman in a town having no organized fire department, shall be entitled to the benefits thereof." "Section 77. If a fireman in a regularly organized fire department of a city or town, or any officer or member in active service of any incorporated protective department acting in concert with fire departments, or a person doing fire duty at the request or by the order of the authorities of a town which has no organized fire department, or a person performing the duties of a fireman in such town, is killed, or dies within sixty days from injuries received while in the performance of his duties, and his death is certified by the city or town clerk and the attending physician or medical examiner to the treasurer and receiver-general, he shall pay to the executor or administrator of such fireman, out of the money received from taxes on fire insurance companies doing business in this Commonwealth, the sum of one thousand dollars for the use equally of his widow and minor children; or if there are minor children but no widow, to their use; or if there is no minor child, to the use of the widow; and if there is no widow or minor child, to the use of the next of kin if dependent on such deceased fireman for support. A child of full age dependent upon such fireman for support shall be regarded as a minor child."

The original statute establishing this fund (Acts of 1892, c. 177) does not materially differ from §§ 71 to 76 of the Revised Laws, c. 32; and the provisions of § 77, originally enacted in St. 1893, c. 401, were almost identical with those of said § 77.

It appears, therefore, that the Legislature has contemplated two distinct sources of relief for firemen injured, or to the families of those killed, in the service: (1) from the firemen's relief

fund, a sum not exceeding in the aggregate \$10,000, annually set apart; (2) in cases where firemen are killed or fatally injured, from money in the custody of the Treasurer of the Commonwealth; the source of income in both cases being taxation levied upon fire insurance companies doing business in this Commonwealth.

I am of opinion that § 77 does not conclusively limit or restrict the action of the Board provided for in § 73, in relation to relief for firemen who may be injured in the performance of their duties at a fire, or in going to or returning from the same, and for the relief of widows and children of firemen killed in the performance of such duties, in the manner and to the amount to be determined by such Board. It might be held that § 77 acted as a repeal of so much of the preceding sections as related to firemen killed or fatally injured in the performance of their duties; but I do not think this conclusion necessary or inevitable, in view of the fact that the preceding sections were amended by St. 1902, c. 108, which in effect increased the annual appropriation for the firemen's relief fund from \$10,000 to \$12,000, and showing the apparent intent of the Legislature to continue the relief from the fund, as distributed by the Board.

I therefore conclude that the Board of Commissioners of the Firemen's Relief Fund have the same powers and duties which they had previous to the enactment of § 77 in its original form; and that they may, though they are not required to, vote relief to widows and children of firemen if they deem it proper, notwithstanding the provisions in § 77 for the payment of the specific sum of \$1,000 in cases of death or fatal injury.

Your question is, whether it is *obligatory* to pay to the widows of deceased firemen killed in the service anything in addition to the amount granted to the minor children; that is to say, whether you are required to pay, in addition to the sum of \$1,000, the allowance of \$400 made before the enactment of the law providing for the payment of \$1,000. It does not appear that formerly it was obligatory upon the Board to grant any specific amount to the widows or children of firemen killed in the service, under § 73, the amount so to be paid being left to the discretion of the Board.

I am of opinion that the question of amount of payment, and whether there shall be any payment in addition to the sum of \$1,000, is still discretionary with the Board. In other words, I am of opinion that the specific payment of \$1,000 upon a death claim is not an exclusive substitute for the former allowance of \$400; but I am led to conclude that your Board may well consider this specific payment of \$1,000 to be an adequate and reasonable provision, in substitution of the former allowance, and the Legislature may have so intended. At all events, it seems perfectly clear to me that, in the exercise of a wise discretion, and having regard to accomplishing the greatest good from the funds under your control, you may well discontinue the former allowance of \$400, especially as I assume that there are more cases calling for relief where there is a disability, than cases arising where a fireman had suffered death in the performance of his duty.

I therefore advise you that your Board is authorized, under the present statutory provisions, to discontinue the former allowance of \$400, considering the payment of \$1,000, specifically provided for, as in lieu of and in substitution for the purpose then not definitely specified in legislation, but now, by the provisions of § 77, designated and established.

MASSACHUSETTS HIGHWAY COMMISSION — STATE HIGHWAY —
LIABILITY OF COMMISSION FOR REMOVAL OF POLES WHICH
ARE A MENACE TO PUBLIC.

The Massachusetts Highway Commission, in removing poles which were erected by a telephone company along a State highway, and have become a menace to the public by reason of neglect or decay, after proper notice of that fact, and notice that adequate measures must be taken to insure safety of existing poles or to substitute new ones, has been given to the company, and a reasonable time allowed for proper action by it, would incur no liability to the company.

To the Massachusetts Highway Commission.
1902
November 7.

The Massachusetts Highway Commission desires the opinion of the Attorney-General upon the following question: "Along the State highway in the town of Grafton, poles which have in the past been used by the Massachusetts Telephone Company

are located. These poles are not now in use; many of them are in bad condition, and the division engineer reports that in his opinion they are a menace to the public travel. The commission has endeavored to have the company (which we understand is now out of existence) remove these poles, and now feel disposed to take the matter in hand and have the poles cut down without further communication with the owners of the poles. Before doing this, however, the commission desires advice . . . on the matter."

Public-service corporations, which maintain by license pipes, wires or other structures in or under a highway, are not in general regarded as having acquired a property right, such as would entitle them to recover damages, where the recovery was limited to persons whose abutting property is injured by improvement of the highway. *Jamaica Pond Aqueduct Corporation v. Brookline*, 121 Mass. 5. It seems to be the rule that such corporations hold their rights and privileges in the street subject to the liability of making changes in the structures which they have erected in the way, whenever public necessity or convenience require changes of location or grade in the highway. See *Matter of Deering*, 93 N. Y. 361; *Natick Gas Light Company v. Natick*, 175 Mass. 246, 252.

Since the right to maintain telegraph or telephone poles in a highway is subject to the liability of removing or altering the location of such structures whenever public necessity or convenience may require it, it would seem that the companies maintaining such structures would be also subject to the liability to have them removed in cases where they became a public nuisance, because they were a menace to the proper use and enjoyment of the way.

Ordinarily, the company would be under a duty to keep such structures in safe and proper condition, and the liability for damages occasioned by their neglect to do so would be sufficient safeguard; but where the company is out of existence, and has abandoned the poles, I am of opinion that the authorities who control the way may properly remove any structures which are dangerous to the safety of the public in using the way, with-

out thereby incurring any liability to the company. In this instance the State Highway Commission is charged with the care and maintenance of the State highway, where the poles in question are situated (R. L., c. 47, § 6), and the ultimate liability for injuries to persons using the way rests upon the Commonwealth (R. L., c. 47, § 13).

It seems to me, therefore, that, if the poles erected along the way have become a menace to the public by reason of decay or neglect, and proper notice of that fact, together with notice that, unless it shall forthwith take adequate measures to ensure safety of existing poles or to substitute new ones, such poles will be removed by the commission, has been given to the company, and a reasonable time allowed for proper action, the State Highway Commission would incur no liability to the company by removing them if it neglects to make such removal.

STATE BOARD OF PUBLICATION — DOCUMENTS — APPROVAL OF OFFICIAL PUBLICATION.

The word "documents," as used in St. 1902, c. 438, § 2, extends to and includes a compilation by a State officer of laws relating to the department under his charge, and also a publication by a State Board, containing certain information useful in the schools of the Commonwealth, and such publications must be approved by the State Board of Publication.

To the State
Board of
Publication.
1902
November 11.

Your letter of October 27 requires my opinion as to the scope of the authority of the State Board of Publication, under the provisions of St. 1902, c. 438. You state that the question arises upon an application of a State officer for authority to print a compilation of the laws relating to the department under his charge, and upon a request of a State Board for authority to publish certain information useful in the schools of the Commonwealth; and the specific question submitted by you is, whether or not publications of the kind indicated are included within the words "other documents," as used in § 2.

St. 1902, c. 438, § 1, establishes a State Board of Publication. Section 2 (the section in question) provides that it shall be the duty of such Board "to examine the annual reports and all spe-

cial reports and *other documents* issued by or on behalf of the Commonwealth by any public officer, board or commission, and to define the form and extent thereof," with certain exceptions thereafter made. Section 3 provides that public officers, boards or commissions may, in addition to their annual report, make such special reports as shall be deemed by the State Board of Publication to be of practical utility. Section 4 provides that all boards or commissions, before entering upon the preparation of any publication, shall submit to the State Board of Publication careful statements of the scope and estimates of the size of the intended publication, and such Board is given power to determine the number of pages, to decide upon the desirability of illustration and other details. By § 6 an appeal is permitted from the decisions of the Board to the Governor and Council.

The word "document," as used in this statute, has no technical signification. It is employed in its ordinary meaning, and denotes a written or printed paper, containing an authoritative record or statement, or, more generally, a publication which is designed to serve as a source of evidence or information upon a particular subject or class of subjects.

Taken in this sense, I have no hesitation in advising you that the word "document," in St. 1902, c. 438, § 2, extends to and includes publications of the character referred to in your communication, and that such publications are subject to the examination and approval of your Board.

METROPOLITAN WATER AND SEWERAGE BOARD — CONSTRUCTION OF BUILDINGS — PERMIT FROM LOCAL AUTHORITIES.

The Metropolitan Water and Sewerage Board is not required to obtain a permit from the building department of the city of Boston before proceeding with the erection of a pumping station, and such department cannot require that block stone shall be used in the foundation of such structure.

Your letter of November 14 required my opinion upon the following questions: First, do the building laws of the city of Boston apply to the constructional work of the Metropolitan Water and Sewerage Board, so to require that block stones

To the Metropolitan Water and Sewerage Board.
1902
November 17.

should be used in the foundations? Second, is the Board required, before proceeding with the construction of a pumping station, to obtain a permit from the city department of the city of Boston?

You state that the Metropolitan Water and Sewerage Board is now constructing a pumping station for the high-level sewer, under the provisions of St. 1899, c. 424. That statute, in § 1, authorizes the Board, for the purpose of constructing, maintaining and operating a system of sewage disposal for the south metropolitan system, "to construct, maintain and operate such mains, sewers and other works as may be necessary in substantial accordance with the plans outlined in a special report of said board to the general court of eighteen hundred and ninety-nine." The work so authorized is a public work, and the Board acts as the agent of the Commonwealth in exercising the authority of the sovereign over its own property, and its acts are the acts of the Commonwealth. In the exercise of the authority thus conferred upon it the Board is not to be deemed subject to the restrictions imposed by St. 1892, c. 419, and acts in amendment thereof, regulating the erection of buildings in the city of Boston, unless such restrictions are made applicable to its proceedings by clear intendment of such statutes. See 1 Op. Atty.-Gen. 290; 2 Op. Atty.-Gen. 56.

It cannot be supposed that the Legislature, in establishing these regulations, the purpose of which was to secure the safety of citizens who may occupy the buildings, intended to limit or restrict the authority of the Commonwealth over its own property. It is to be presumed that the Commonwealth will take all necessary precautions to insure the safety of buildings erected upon its own property and for its own use, and that the supervision of a local officer over the work of construction is unnecessary.

I am therefore of the opinion that your Board is not required, before proceeding with the construction of the building in question, to obtain a permit from the building department of the city of Boston, and that such department cannot require that block stone should be used in the foundation of such building.

FOREIGN CORPORATION — RIGHT TO FILE PAPERS WITH COM-
MISSIONER OF CORPORATIONS.

The Commissioner of Corporations may not receive for filing the papers of a foreign corporation engaged in the business of loaning money to its members, under a contract with each member that, upon the payment of a weekly premium, the company will loan to such member, upon the maturity of his contract, a sum of money for the purchase of a home, such maturity being regulated by the numerical order of acceptance of the several contracts, for the reason that the transaction of such business by domestic corporations is forbidden by the provisions of R. L., c. 73, §§ 7, 8.

In your letter of December 12 you ask whether the Co-operative Home Purchasing Association, a corporation of Rochester, N. Y., is entitled to be admitted to do business in Massachusetts.

To the Com-
missioner of
Corporations
1902
December 29.

The association enters into contracts with its members, the essential terms of which are as follows: The member agrees to pay to the association 50 cents per week until his contract "matures." Falling behind in his payments, he forfeits, if within one year, all he has paid; if after one year, 20 per cent. thereof. Upon "maturity" the association agrees to loan him \$1,000 for the purchase of a house, taking the title to itself, and allowing him to occupy it as a tenant upon payment of \$7 a month, until such time as he has paid for the property, and an additional sum for the expenses of the association; then the title is to be transferred to him.

The feature wherein the transaction differs materially from an ordinary loan upon mortgage security is the postponement of the loan in each case until the maturity of the contract. The first contract is matured when there is in the treasury of the association \$1,000, accumulated from payments and forfeitures; the second contract matures when \$1,000 more is accumulated; and so on, the association applying its funds to the contracts in the numerical order of their acceptance.

Plainly, the maturity of all except the early contracts will be far in the future, if it ever occurs. In case the contract does not mature in three years, the holder, if not in arrears, may treat his payments as a loan to the association, which agrees to repay it, with 6 per cent. interest, when there is money enough in the treasury. This event also depends upon the contract being reached in its numerical order.

Without considering the illegality of such a contract at com-

mon law, I am of opinion that it is prohibited by R. L., c. 73, §§ 7 and 8: "Section 7. No person or corporation shall issue, negotiate or sell any bonds, certificates or obligations of any kind, which are by the terms thereof to be redeemed in numerical order or in any arbitrary order of precedence without reference to the amount previously paid thereon by the holder thereof, whether they are sold on the instalment plan or otherwise." "Section 8. A person or corporation violating the provisions of the preceding section shall forfeit fifty dollars for each offence. Such violation by a domestic corporation shall operate as a forfeiture of its franchise; and such violation by a foreign corporation, association or organization shall operate as a discontinuance of its right to do business in this commonwealth, and the supreme judicial court or the superior court, upon the application of the commissioner of corporations, shall have jurisdiction in equity to enjoin such foreign corporation, association or organization from further continuing its business in this commonwealth." If the obligation fails to mature in three years, it is to be redeemed in its numerical order by repayment of the sums paid in, with 6 per cent. interest.

It is therefore your duty to refuse to allow the Co-operative Home Purchasing Association to file in your department the papers required by R. L., c. 126, §§ 4 to 7 inclusive.

TAXATION — REAL ESTATE TRUST — VALUATION OF CORPORATE FRANCHISE — DEDUCTION OF STOCK AND BONDS.

Shares of stock in a real estate trust, so called, which represent the rights of the beneficiaries in real estate, under a declaration of trust providing that no right, title or interest in such real estate shall vest in the shareholders, are personal property, and, as such, are not to be deducted by the Commissioner of Corporations in ascertaining (under the provisions of R. L., c. 14, § 38) the valuation of the corporate franchise of a corporation owning such shares, for the purpose of taxation.

With the bonds of such trust, however, which are secured by real estate owned by the trustees, it is otherwise, and the value of such bonds may be deducted from the aggregate value of the shares of the corporation in determining the taxable value of the franchise.

To the Tax
Commissioner.
1908
January 6.

In your letter of November 3 you ask whether, in ascertaining the value of a corporate franchise for the purposes of taxation,

you are required, under R. L., c. 14, § 38, to deduct as "real estate subject to local taxation" stocks and bonds of certain real estate trusts, so called.

The stocks are shares representing the rights of beneficiaries in real estate, under certain declarations of trust which provide that no title, interest or estate in any land is to vest in the shareholders, and that the shares are to be and remain as to title personal property only. The bonds are mortgage bonds, secured by real estate owned by such trustees. The trustees have paid local taxes on all the real estate, assessed by the local authorities as of May 1, 1902.

As to both stocks and bonds, it is obvious that, unless they are deducted from the value of the corporate franchise, double taxation will result. Though not taxable to individuals owning them, if they are allowed to enter into the estimated market value of the capital stock of the corporation which owns them, they will be taxed indirectly, while the real estate which makes them valuable has already paid a tax. If the spirit of forbidding double taxation were perfectly carried out in the law, these interests would be deducted, but there are numerous instances where the spirit has failed. The Legislature has not provided that a corporation may deduct from the value of its franchise all property elsewhere taxed, or upon which an unincorporated owner would not be required to pay a tax. For example, if a corporation owns stock in another domestic corporation, this may not be deducted from the value of the former corporation, though to an individual owner it would not be taxable. The Legislature has provided merely for deduction of real estate and machinery upon which a local tax has been paid. Therefore, unless these stocks and bonds are real estate, you are not authorized to deduct them.

First, as to the shares of stock. It may be suggested that, since the trust is not a corporation, the shareholders have the whole equitable estate in the land, subject to certain restrictions contained in the trust agreement, in spite of the provision that their interest shall be only personal, this provision being ineffectual until the property is actually converted into personality. Such a contention was made in *Howe v. Morse*, 174 Mass.

491, but the court found it unnecessary to pass upon it. If this is sound, then it may be that the corporation owning an equitable interest in real estate, subject to local taxation to the trustees, should deduct its value.

But, while there is no authority upon either side of the question, in my opinion the interest of a shareholder is personal property. One hundred years ago the question was much discussed whether stock in corporations, whose property consisted exclusively of real estate, was not an interest in realty. While a few States held it to be realty until the doctrine was corrected by legislation (see *Welles v. Cowles*, 2 Conn. 567; *Copeland v. Copeland*, 7 Bush, 349), the English and most of the American decisions settled down upon the other view, only one of them (*Johns v. Johns*, 1 Ohio State, 351) basing it solely upon the ground which is the one point of difference between that case and the present, — that the interested parties were incorporated. See *Russell v. Temple*, 3 Dane Abr. 108 (Mass. 1798); *Bligh v. Brent*, 2 Y. & C. 268 (1837); *Arnold v. Ruggles*, 1 R. I. 165 (1837). See *In Re Jones' Estate*, 172 N. Y. 575.

These leading decisions mention as one ground that the real estate is owned not by the members, but by the corporation, which is a distinct entity; and base their conclusion also upon the ground, which applies as well to the present situation, that the test must be not the nature of the property out of which the dividends come, but the nature of the rights which ownership of the stock carries. These rights are strictly personal in both cases. The fact that the property is owned by a real instead of an artificial person is not, in my judgment, an essential distinction. I advise you, therefore, that you have no authority to deduct these shares owned by the corporation from the value of the corporate franchise.

The bonds, on the other hand, present a different question. The interest of a mortgagee of real estate under a duly recorded mortgage is declared by statute to be real estate for the purposes of taxation. If a corporation is mortgagee, it is held that such interest must be deducted from the market value of its shares in taxing the corporation. *Firemen's Insurance Co. v. Common-*

wealth, 137 Mass. 80. From that decision it is a step forward to hold that the interest of a holder of bonds secured by a trust mortgage of real estate is real estate; but this step has been taken by a divided court in construing the statute exempting "any loan on mortgage of real estate taxable as real estate" (R. L., c. 12, § 4, cl. 2) from taxation as personal property. *Knight v. Boston*, 159 Mass. 551. In view of these decisions, it is my opinion that you should deduct the value of these bonds from the aggregate value of the shares of the corporation.

HOUSE OF REPRESENTATIVES — ORDER REQUIRING INSTITUTION
OF SPECIFIC PROCEEDINGS — ATTORNEY-GENERAL.

The House of Representatives has no authority to require that the Attorney-General forthwith appear before some justice of the Supreme Judicial Court for the purpose of obtaining from the court an order restraining the stockholders of a gas company from taking action to increase its capital stock, or to require him to institute specific proceedings of any character.

In response to the order issued by the Honorable House of Representatives, purporting to require the Attorney-General forthwith to appear before some justice of the Supreme Judicial Court for an order restraining the Massachusetts Gas Companies and its shareholders from increasing its shares of stock, and for such further or other relief in the premises as to said court shall seem meet, which order is in the form following: —

To the House
of Representa-
tives.
1906
January 8.

Ordered, That the Attorney-General forthwith appear before some justice of the Supreme Judicial Court for an order restraining such association, the Massachusetts Gas Companies, or its shareholders, from taking any such action as is contemplated in the above notice to shareholders, and for such further or other relief in the premises as to said court shall seem meet. And the clerk of this House is hereby directed to immediately notify the Attorney-General's office of the passage of this order, —

I submit, for the consideration of that honorable body, the following suggestions: —

The Honorable House of Representatives is doubtless aware that it has no authority to fix a limit of time within which the Attorney-General shall discharge the duties of his office.

The House of Representatives has no power to compel action by the Attorney-General, as prescribed by the terms of the order. Chapter 7 of the Revised Laws defines the duties of the Attorney-General, providing that he shall, when required by either branch of the General Court, attend during its sessions and give his aid and advice in the arrangement and preparation of legislative documents and business, and shall give his opinion upon questions of law submitted to him by the Governor and Council or by either branch of the General Court; and it is further provided that he shall appear for the Commonwealth in all suits and other civil proceedings in which the Commonwealth is a party or interested, or in which the official acts and doings of its officers are called in question, in all courts of the Commonwealth, and in such suits and proceedings before any other tribunal, when requested by the Governor or by the General Court or by either branch thereof.

No authority is conferred upon the General Court, or either of its branches, to order the Attorney-General to institute specific proceedings of any character. Should the Legislature pass a statute absolutely requiring the Attorney-General to institute a definite action, such statute would be unconstitutional, as in conflict with Article XXX. of the Declaration of Rights of the Massachusetts Constitution, which provides that in the government of this Commonwealth the legislative department shall never exercise the executive and judicial powers, or either of them.

The deference that I owe to the source of the order addressed to me leads me to state more fully the considerations upon which my conclusions are based.

The form and tenor of the communication from the House of Representatives compels me to remind that honorable body that its constitutional powers and functions are legislative, not executive, and that the limitations of these respective jurisdictions must be inviolately preserved and maintained. The law of this Commonwealth has imposed upon the Attorney-General responsible executive duty and authority, which he can delegate to no other officer or department of the government; and, on the other

hand, no other department established by our constitutional law has power to assume the exercise of functions committed by the people to his charge, or power to direct or command him to act upon the dictation of any other influence than that of his own conception of his duty under the law, to which alone he owes official obedience. He can evade no responsibility in the discharge of his duties by yielding to the assumed authority of any other officer or servant of the State. He can find justification for his conduct in office by no plea that he has surrendered his discretion or authority to any other official power whatsoever. That the people may know upon whom to charge a failure in the performance of public duty, each officer must stand responsible for his every act within the field of the jurisdiction committed to his charge and care.

The communication of the Honorable House of Representatives fails to recognize the elemental principles of the constitutional law of the Commonwealth. Its action, as indicated by this communication, is based upon no lawful authority vested in it. I am, therefore, compelled to respectfully advise the Honorable House of Representatives that I cannot act in obedience to the specific command transmitted to me.

It would seem, from the communication addressed to me, that the Honorable House of Representatives is of opinion that facts and conditions exist requiring immediate action in behalf of the Commonwealth. If this be true, I regret that the House of Representatives has not followed the course prescribed by the law in such event, and communicated to me the evidence of such facts and conditions, in order that I might, within the field of my official duty, have given that consideration to the issues which their apparent importance might require, and have advised the Honorable House of Representatives, if it so required, in accordance with my duty in that regard, whether any or what action ought to have been, or ought now to be, taken in the premises, or to have taken such action upon my own initiative as investigation of the facts and evidence submitted to me might have warranted or justified.

• SOLDIERS' AID — WIDOW OR DEPENDENT RELATIVE OF VETERAN
— EFFECT OF CRIMINAL OR WILFUL MISCONDUCT.

The provision in R. L., c. 79, § 18, excepting from the benefits of "soldiers' aid" a person, otherwise eligible, who has become poor and unable to support himself by reason of his own criminal or wilful misconduct, is limited in application to veterans; and, in the case of the widow or other dependent relative of a soldier who was himself entitled to receive such aid, the fact that poverty was the result of insanity, caused by intemperance, is not material.

To the Super-
intendent of
State Adult
Poor.
1908
January 13.

You require my opinion upon the question of the right of an inmate of the Worcester Insane Hospital to receive "soldiers' aid," under the provisions of R. L., c. 79, § 18.

It appears that the inmate in question is the widow of a soldier who had a settlement in the city of Boston, and who served in the army of the United States during the war of the rebellion and received an honorable discharge from all enlistments therein; and it is alleged that she is in need of the assistance afforded by the statute by reason of insanity, caused by intemperance.

R. L., c. 79, § 18, provides in part that "if a person who served in the army or navy of the United States in the war of the rebellion and received an honorable discharge from all enlistments therein, and who has a legal settlement in a city or town in the commonwealth, becomes, from any cause except his own criminal or wilful misconduct, poor and entirely or partially unable to provide maintenance for himself, his wife and minor children under the age of sixteen years, or for a dependent father or mother; or if such person dies leaving a widow or such minor children or a dependent father or mother without proper means of support, he or they shall receive such support as may be necessary by the city or town in which they or either of them have a legal settlement."

The Commissioner of Soldiers' Relief for the city of Boston has raised the question whether the exclusion from the benefits of the statute of a soldier who has become poor and entirely or partially unable to provide maintenance for himself and his family, through his own criminal or wilful misconduct, may be extended to the following provision with regard to the widow or minor children or the other dependent relatives named of a soldier who was himself within the qualifications of the statute.

It is admitted that there was no express exception in the case of the widow or other dependents named in the statute; but it is contended that it is the spirit of the law that its benefits should not be extended to persons who become poor by reason of their own criminal or wilful misconduct.

While there is much force in this contention, I am of opinion that the exception referred to in the case of the soldier himself should not be construed to include his widow, minor children or dependent father or mother. The purpose of the act was undoubtedly to insure the proper maintenance of worthy veterans and their families, and the aid to be furnished to the widow or other relatives of the soldier himself was in the nature of a reward to him, and an assurance that those dependent upon him should be provided for; and this ought not to be held contingent upon their conduct, especially since it might be a perplexing and difficult problem to determine whether the insanity was due wholly to wilful fault, or to misfortune.

It seems more consistent with the true intent of the act to hold that the provision excepting a soldier reduced to poverty by his own wilful or criminal conduct from the benefit of the statute does not extend to the widow or other dependent relatives of a worthy veteran; and that the alleged fact that the person in question became insane through intemperance is not material.

CIVIL SERVICE — CHIEF SUPERINTENDENT — OFFICERS APPOINTED BY THE BOARD OF PUBLIC WORKS IN THE CITY OF WOBURN.

Under the provisions of St. 1897, c. 172, amending the charter of the city of Woburn, and creating in section 32 a board of public works, whose affairs are divided into four administrative bureaus, namely, sewers, highways, water and water supply, and public buildings and grounds, officers appointed by such board and designated respectively superintendent of sewers, superintendent of highways, superintendent of water, and superintendent of public buildings and grounds, are not "chief superintendents of departments," within the exemption in Rule VII., Schedule B, Class 12, of the civil service rules, and must be appointed in accordance with such rules.

You have requested my opinion upon the following facts. St. 1897, c. 172, amended the city charter of Woburn, and authorized, in § 32, the establishment of a board of public works,

To the Civil
Service Com-
mission.
1908
January 28.

to consist of the mayor and four other persons. Section 34 provides that the four members in addition and the mayor shall be elected one in each year, to serve for a term of four years. Section 35 provides as follows: —

The affairs of said department of public works shall be divided by the board between four administrative bureaus, as follows: —

First. — A bureau of sewers, the chief officer of which shall be known as the commissioner of sewers.

Second. — A bureau of highways, the chief officer of which shall be known as the commissioner of streets.

Third. — A bureau of water and water supply, the chief officer of which shall be known as the commissioner of water and water supply.

Fourth. — A bureau of public buildings and grounds, the chief officer of which shall be known as the commissioner of public buildings and grounds.

The said four commissioners shall receive an annual salary of two hundred and fifty dollars each. The duties of the several bureaus shall be such as may be referred thereto from time to time by the board of public works; the mayor shall designate each member of said board as commissioner of one of said bureaus, who shall discharge the duties thereof under the direction of the board and the supervision of the mayor. In case of a vacancy in the office of the chief of any of said bureaus, or of the absence or disability of any of them, the mayor may assign the duties of such bureau during such vacancy, absence or disability, to any other member of the board, who shall thereupon assume the duties thereof. The mayor may transfer any member of the board from the administration of the duties of one bureau to those of another.

Under the provisions of this section, the mayor of Woburn has designated the four members of the board of public works, elected as commissioners of sewers, streets, water and water supply, and public buildings and grounds, respectively.

It is further stated that the board of public works of Woburn, without requisition upon or certification from the Civil Service Commissioners, has appointed the following officers: the superintendent of sewers, at a salary of \$600; the superintendent of highways, at a salary of \$1,000; the superintendent of water, at a salary of \$1,100; and a superintendent of public buildings and grounds, whose salary is not stated; and it is contended that these officers are exempt from the operation of the civil service

rules, as being chief superintendents, within the exception provided by Civil Service Rule VII., Schedule B, Class 11, which is as follows: —

Superintendents, assistant superintendents, deputies and persons, other than the chief superintendents of departments, performing any of the duties of a superintendent in the service of any city of the Commonwealth.

It is now well established that a chief superintendent must be an officer acting under a distinct department of the city government, who is authorized to act for and represent that department throughout the whole of its jurisdiction. See *Attorney-General v. Trehy*, 178 Mass. 186; 2 Op. Atty.-Gen. 280, 344.

I am of opinion that, under this construction, no one of the specified appointments of officers by the board of public works is exempt from the operation of the civil service rules, and that such appointments were in violation of the provisions of law relating to the civil service and the rules established thereunder by your commission.

MILITIA — GOVERNOR — TRANSFER OF COMPANY OF MILITIA FROM ONE CITY OR TOWN TO ANOTHER.

The Governor, as Commander-in-Chief of the volunteer militia of the Commonwealth, has no authority to order the transfer of a company of militia from the city or town where such company is lawfully established and located to some other city or town.

Your Excellency has required my opinion whether the Governor, as Commander-in-Chief of the militia, has authority to transfer a company of the militia established and lawfully located in one city or town to another.

To the
Governor.
1903
February 18.

The general authority of the Commander-in-Chief is to be found in R. L., c. 16, §§ 24 and 25, which are as follows: —

SECTION 24. The commander-in-chief shall arrange the infantry, artillery and cavalry into regiments, battalions, and, when necessary, into unattached companies, and into not more than two brigades. There

shall not be more than six regiments of infantry, one regiment or more of which, at the discretion of the governor, may be changed to heavy artillery and uniformed and instructed as such.

SECTION 25. Petitions for organizing volunteer companies, accompanied by the approval of the mayor and aldermen of cities or the selectmen of towns in which a majority of the petitioners reside, may be granted by the commander-in-chief, due regard being had to a proper distribution of the force throughout the commonwealth; but no new company shall be organized except as provided in section eleven, if thereby the whole number of companies shall exceed the number established in this chapter.

Section 33 provides that the Commander-in-Chief may disband any company of the volunteer militia falling below the required standard of efficiency.

Assuming the company now under consideration to have been regularly organized and established, upon petitions of persons as prescribed in § 25 above quoted, in the city or town within which it is now quartered, and that it is maintained in accordance with the required standards of efficiency, I am of opinion that the Commander-in-Chief is not authorized to transfer, by his own order, such company to another city or town. It is evident, I think, that the militia law of this Commonwealth looks to an organization local in its nature, the company units of which are established at the desire of the inhabitants of any city or town, and are to consist in large part of such inhabitants. In other words, it appears to be the intention of the law that the company shall be composed of persons resident in or near the town where it is quartered, such conditions manifestly tending to maintain interest and activity in the service. In a lesser degree the same idea prevails with regard to the larger divisions of the service. To transfer a company from one city or town to another, by the order of the Commander-in-Chief, would be contrary to the evident theory of the militia law, because necessarily it would remove the place of service of the members so transferred to a locality more or less distant from their homes, and thereby either interfere with the efficiency of the company or at least add greatly to the burden of the service. Such transfer by the Commander-in-Chief, if he had the power, might be without a petition

by the inhabitants of the city or town to which the company should be transferred, since petitions for the location of militia companies are required only for the organization of new companies.

Such transfers by the Commander-in-Chief might further result in the imposition of serious burdens upon the city or town to which such transfer was made, and this even against the wishes of the citizens thereof, the law requiring the city or town in which a company is located to maintain, at its own expense, a suitable armory and suitable places for parade, drill and target practice. See R. L., c. 16, § 105.

The question Your Excellency submits to me is not entirely free from difficulty. A strained construction of the sections of the statute above referred to might confer this power of transfer or removal upon the Commander-in-Chief; but I am of opinion that the law should be construed strictly, and that, in the absence of direct and specific authority conferred upon the Commander-in-Chief, it is more consonant with the spirit and intent of the law as it exists to hold that such transfer, as suggested by Your Excellency's inquiry, does not lie within the express power of the Commander-in-Chief.

The provisions of § 115 of said chapter, relating to the location of an armory by a majority of the members of a company formed from different places, which location shall be subject to the approval of the Adjutant-General, further confirm this view, as fixing the location of militia companies upon considerations other than those of the order of the Commander-in-Chief.

I am, therefore, of opinion that authority to take such action is not vested in the Commander-in-Chief.

EXTRADITION — FUGITIVE FROM JUSTICE — SWORN EVIDENCE
— CERTIFICATION OF OFFICER TAKING OATH.

Under the provisions of R. L., c. 217, § 11, requiring that, in the case of a demand upon the Executive of this Commonwealth for the surrender of a person charged with crime committed within the limits of the demanding State, such demand shall be accompanied by sworn evidence that the person charged is a fugitive from justice, an allegation in the petition of the principal complaining witness to the Executive issuing the demand, stating that the person sought to be extradited is a fugitive from justice, and sworn to before one signing himself, "J— R—, *pro* clerk of the court of quarter sessions," such statement not being authenticated by the Executive, and there being no evidence that R— was authorized to administer oaths, is not "sworn evidence," within the meaning of the statute, and the Governor may not lawfully comply with such demand.

To the
Governor.
1908
February 20.

I have the honor to report that, in the matter of the requisition of the Executive of the Commonwealth of Pennsylvania upon Your Excellency for the arrest and extradition of Thomas H. Cummings, an alleged fugitive from justice, charged in Pennsylvania with the crime of false pretences, counsel representing both the alleged fugitive and the agent of the State of Pennsylvania have been given full opportunity to be heard; and after such hearing, and after careful consideration of the papers accompanying the requisition, I am constrained to advise Your Excellency that you may not legally comply with the demand of the Governor of Pennsylvania.

Revised Statutes of the United States, § 5278, makes it the duty of the Executive of a State upon whom a demand is made for the extradition of an alleged fugitive from justice to surrender such fugitive, provided it appears that the papers accompanying the requisition contain (1) a demand of the Executive of the State from which the fugitive has fled; (2) a copy of an indictment found or an affidavit made before a magistrate, charging the fugitive with having committed the crime; and (3) the certification of such indictment or complaint by the Executive.

The constitutional provision for extradition, however, relates only to persons who are fugitives from justice; and the duty to surrender a person demanded does not arise unless it appears that he is, as a matter of fact, a fugitive from justice. Upon this point the decision in general rests with the Executive of the

State upon which the demand is made, as a question of fact, to be decided upon such evidence as he may deem satisfactory. See *Roberts v. Riley*, 116 U. S. 80; *Ex parte Reggel*, 114 U. S. 642. No method of proof of this fact is prescribed either by the Constitution or by the Statutes of the United States; but in this Commonwealth the Legislature has provided that this material fact shall be established by sworn evidence that the person is a fugitive from justice (R. L., c. 217, § 11), and the Governor of this Commonwealth is not authorized to issue his warrant unless such evidence is submitted to him.

In the application of the Governor of Pennsylvania for the surrender of Thomas H. Cummings, the only allegation that the person demanded is, in fact, a fugitive from justice, is contained in the petition of one Florence S. Zimmerman to the Governor, asking that a requisition be issued. That petition sets forth that Thomas H. Cummings was in the county of Philadelphia and State of Pennsylvania at the time of the commission of the offence charged; that before arrest could be made he fled from the State of Pennsylvania; that he is now in the county of Suffolk in this Commonwealth, and is a fugitive from the justice of Pennsylvania. This statement purports to be sworn to before John L. Reiser, "*Pro* clerk of the Court of Quarter Sessions," and the seal of that court is annexed to the affidavit. There is no other evidence in the papers that said Cummings is in fact a fugitive from justice, except such inferences as may be drawn from the certification by the district attorney of Philadelphia County, which is substantially in accordance with the rules for interstate rendition. This certification is not sworn to, and allegations contained in it, so far as they may be construed to be allegations that Cummings is a fugitive from justice, are conclusions of law, and not sworn evidence of fact, as required by the laws of this Commonwealth.

There appears to be no evidence disclosed by the record that the person before whom Florence S. Zimmerman made oath to the truth of the statements contained in her petition was, by reason of any official position, authorized to administer oaths. A defect in setting forth the authority of the person before whom

such oath is taken would ordinarily be cured by the certification of the Executive of the demanding State, which is generally comprehensive enough to include not only a copy of the indictment or complaint, as required by the United States Statute, but also the papers accompanying it. But in this instance it is only the copy of the indictment which the Governor of Pennsylvania certifies to be authentic and duly authenticated in accordance with the laws of Pennsylvania. This being so, and there being no evidence upon the record that John L. Reiser was authorized under the laws of Pennsylvania to administer oaths, I am of opinion that this paper is not sworn evidence, within the meaning of R. L., c. 217, § 11, and that, in the absence of such sworn evidence, Your Excellency cannot lawfully comply with the demand of the Executive of Pennsylvania for the extradition of the said Thomas H. Cummings.

CITY OR TOWN — GRANT OF FRANCHISE FOR USE OF STREETS
— COMPENSATION.

In the absence of specific legislative authority therefor, a city or town has no power to demand compensation for the grant of a franchise for a special use or easement in the streets or ways of such city or town.

To the
Governor.
1908
March 4.

Your Excellency requires my opinion upon the question "whether or not towns have any rights in highways, for which they can charge for the use thereof; that is, whether or not they could give any one special rights, for compensation, in a highway." I conceive the purport of Your Excellency's inquiry to be whether a municipality has any right to demand and receive compensation for a franchise granted by such municipality for a special use or easement in the streets or ways of the same.

I am of opinion that no such right exists at common law, and can obtain, if at all, only where it has been specially delegated to a town or city by authority and grant of the Legislature. It is clear that public streets and ways, as such, belong to the whole public, represented by the Commonwealth. If local boards of aldermen or selectmen should assume to make grants of special rights to the use of such streets and ways, they could do so only as agents of the general public, since no such power could be

delegated to them by the municipality, for the municipality would have neither jurisdiction nor authority in the premises.

Authority to impose restrictions or obligations upon corporations or individuals to which franchises in public ways were to be granted must, as I have suggested, be conferred by special statutory authority. No such general authority now exists by virtue of which a municipality can make such grants for compensation to it, or impose specific local restrictions or obligations upon such use.

It has heretofore been held, in an opinion by one of my predecessors, dated May 25, 1900, that local municipal authorities "had no right to bargain and sell street railway franchises, nor to make terms with street railway companies which should accrue to the financial benefit of the cities and towns in which the locations were given. They could not make a binding contract either for a time limit of the franchise or for the payment of any revenue, directly or indirectly, to the Commonwealth or to a city or town." 2 Op. Atty.-Gen. 182.

I do not cite judicial authority expressed in a series of opinions of courts of last appeal in support of the views I express, doubting whether Your Excellency will deem it necessary to examine them.

For the reasons I have briefly stated, I have the honor to advise Your Excellency that in my opinion your inquiry should be answered in the negative.

SOLDIERS' AID — CRIMINAL OR WILFUL MISCONDUCT OF VETERAN — WIFE OR WIDOW AND DEPENDENT RELATIVES.

R. L., c. 79, § 18, is not applicable to a soldier who, by reason of his own criminal or wilful misconduct, has become poor and wholly or partially unable to support himself; and, although such soldier may in other respects be eligible under the statute, neither he nor his family are entitled to the aid therein provided.

You ask my opinion upon the construction of the first eleven lines of R. L., c. 79, § 18, the specific questions being as follows: —

"1. If a soldier debarred by criminal or wilful misconduct from the receipt of soldiers' relief is living with his family, which

To the Commissioner of
State Aid and
Pensions.
1908
March 18.

is otherwise eligible, will his unworthiness bar it also from relief in which he does not share?

"2. If a soldier debarred as above is living away from his family, and not contributing to its support, will the family also be debarred?"

The first eleven lines of the section above referred to are as follows:—

If a person who served in the army or navy of the United States in the war of the rebellion and received an honorable discharge from all enlistments therein, and who has a legal settlement in a city or town in the commonwealth, becomes, from any cause except his own criminal or wilful misconduct, poor and entirely or partially unable to provide maintenance for himself, his wife and minor children under the age of sixteen years, or for a dependent father or mother; or if such person dies leaving a widow or such minor children or a dependent father or mother without proper means of support, he or they shall receive such support as may be necessary by the city or town in which they or either of them have a legal settlement.

It is clearly the intention of the section above quoted that the aid to be furnished to a person who has served in the army or navy of the United States in the war of the rebellion and has received an honorable discharge from all enlistments therein shall be conditioned upon his worthiness to receive it; and, if he has become poor and entirely or partially unable to provide for himself and his family by reason of his own criminal or wilful misconduct, he fails to bring himself within its terms, and is excluded from all the benefits conferred by it. The right of the family of a soldier or sailor in the war of the rebellion to receive aid under this section exists only when such soldier or sailor is in all respects eligible to receive such aid; and it must follow that where a person, otherwise eligible, is debarred by his own criminal or wilful misconduct from the relief provided, his family is also debarred from such relief, and this is true whether the person so debarred resides with his family or apart from it.

I am therefore of the opinion that both the questions submitted must be answered in the affirmative.

CONSTITUTIONAL LAW — LEGISLATURE — INSURANCE — CITIES
AND TOWNS AS INSURERS AGAINST FIRE.

The Legislature may not constitutionally authorize cities and towns to establish fire insurance departments, and to act as insurers against fire of all insurable property within their limits. It follows, therefore, that House Bill No. 386, entitled "An Act to authorize cities to insure property against loss by fire," would, if enacted, be unconstitutional and void.

I have the honor to acknowledge receipt of copy of an order of the Legislature under date of March 23, 1903, of the tenor following: —

To the House
of Representatives.
1903
March 27.

That the Attorney-General be requested to inform the General Court whether, in his opinion, the General Court has authority under the Constitution of the Commonwealth to authorize cities and towns to establish fire insurance departments and to act as insurers against fire of all insurable property situated within their limits; and especially to inform the General Court whether, in his opinion, the provisions of House Bill No. 386, now pending, being "An Act to authorize cities to insure property against loss by fire," would, if enacted, be constitutional.

I am clearly of opinion that I must advise the Honorable Senate and House of Representatives that the General Court has no authority under the Constitution of the Commonwealth to authorize cities and towns to establish fire insurance departments, and to act as insurers against fire of all insurable property, situate within their limits. My answer to the first inquiry must therefore be in the negative.

Upon the further inquiry of the Honorable Senate and House of Representatives above stated, I am as clearly of opinion that, were the bill cited to become enacted, it would be, in my opinion, inoperative and void, because unconstitutional. The questions presented appear to me to fall plainly within the field of adjudication and opinion of the Supreme Judicial Court of this Commonwealth, so that I do not deem it necessary at great length to set forth the reasons for holding the opinions which I submit, nor to support them by a multitude of citations of established judicial authority. I call the attention of the Legislature to the recent opinion of the justices of the Supreme Judicial

Court, transmitted to the House of Representatives in reply to its order of January 14, 1903. The reasoning of that opinion and the grounds upon which it is based conclusively fix the limitations upon legislation within such fields as are opened by the inquiries and the proposed bill transmitted to me for examination.

RAILROADS — FOREIGN CORPORATION — PURCHASE OF STOCK OF DOMESTIC STREET RAILWAY COMPANY.

A railroad incorporated under the laws of another State, carrying on business as a railroad within the Commonwealth, and authorized by its charter to invest in the stock of street railways wherever situated, even to the extent of a controlling interest therein, is not prohibited by the laws of this Commonwealth from acquiring the securities and assuming the ownership of domestic street railway corporations.

A railroad holding a charter from a foreign State, permitting the acquisition of stock in street railway companies, and also incorporated under the laws of this Commonwealth, would not have authority, in the absence of special legislative permission, to purchase the stock of street railway companies incorporated in this Commonwealth, such purchase, in the case of domestic corporations, being forbidden by R. L., c. 111, § 77.

To the Committee on
Railroads and
Street Railways.
1903
April 6.

The committee on railroads and street railways requests my opinion upon the following question:—

“*First.*—Has any railroad incorporated in another State, and doing business as such railroad within this State, which has a right under the charter of the foreign State to invest in the securities of street railways wherever existing, the right under the laws of this Commonwealth to invest in the securities and assume ownership of street railways incorporated in this Commonwealth?”

I assume that the foreign charter referred to is broad enough in terms to give the foreign railroad corporation power to purchase or subscribe for stock of our domestic street railways, even to the extent of a controlling ownership therein.

The right of foreign corporations in general to own stock in Massachusetts street railway companies is recognized by R. L., c. 126, § 11:—

If a foreign corporation which owns or controls a majority of the capital stock of a domestic street railway, gas light or electric light corporation

issues stock, bonds or other evidences of indebtedness based upon or secured by the property, franchise or stock of such domestic corporation, unless such issue is authorized by the law of this commonwealth, the supreme judicial court shall have jurisdiction in equity in its discretion to dissolve such domestic corporation. If it appears to the attorney-general that such issue has been made, he shall institute proceedings for such dissolution and for the proper disposition of the assets of such corporation. The provisions of this section shall not affect the right of foreign corporations, their officers or agents, to issue stocks and bonds in fulfilment of contracts existing on the fourteenth day of July in the year eighteen hundred and ninety-four.

There is no provision of our law forbidding such ownership by a foreign railroad corporation. But I do not consider under what circumstances such control might lead to a violation of the Sherman act (26 U. S. Sts. at Large, 209), such inquiry not being germane to the question addressed to me.

The committee further requests my opinion upon a second question:—

“Would such railroad, so incorporated and also incorporated in this Commonwealth, have such authority to purchase the securities of such street railways, unless specially authorized by the Legislature of this State?”

A domestic railroad corporation, without express legislative authority, has no power to acquire the stock of street railways. Such acquisition is, indeed, expressly prohibited to a domestic railroad corporation by R. L., c. 111, § 77:—

No railroad corporation, unless authorized by the general court or by the provisions of the following five sections, shall directly or indirectly subscribe for, take or hold the stock or bonds of or guarantee the bonds or dividends of any other corporation; and the amount of the bonds of one or more other corporations subscribed for and held by a railroad corporation, or guaranteed by it conformably to special authority of the general court or the authority given in said sections, with the amount of its own bonds issued in conformity with sections sixty-three and sixty-four, shall not exceed at any time the amount of its capital stock actually paid in cash.

This second inquiry presents the question whether a railroad corporation, existing by the concurrent legislative authority of

this State and of another, may buy stock in our domestic street railway companies, such purchase being authorized by the foreign State, but prohibited as to domestic railroad corporations by our law. The general law concerning such railroad corporations contains no provisions applicable to or conclusive upon the question submitted. R. L., c. 111, § 4:—

A railroad corporation, chartered by the concurrent legislation of this and other states shall, as regards any portion of its road lying within this commonwealth, be entitled to all the benefits and be subject to all the liabilities of the railroad corporations of this commonwealth.

This statute appears to be applicable rather to the physical locations, the operation and administration of the railroad within our jurisdiction, and does not appear to take into consideration and control those acts which are *ultra vires* of a Massachusetts railroad and *intra vires* of a foreign company. I doubt whether any general answer can be made to the question addressed to me that will be conclusive upon any specific case, for there may be special legislation enacted by our General Court as to certain railroad corporations which would authorize such purchase as is the subject of your inquiry; and an exhaustive examination of all such special legislation would have to be made, to ascertain what might be the rights or authorities of any designated railroad company. I may say, however, that, assuming no such permission has been granted by such special law, I hold to the opinion that our courts would decide that such railroad corporation has no lawful authority to purchase the stock of other corporations, but I do not know that this question has been specifically decided. I may suggest that, if it should be decided that the railroad corporation, created, for instance, by concurrent legislative action of Massachusetts and Connecticut, has a right to buy stock given by the laws of Connecticut but withheld by the laws of Massachusetts, the Legislature would, in my opinion, have power to revoke the Massachusetts charter, if it deemed that such action by the railroad company was sufficiently injurious to the public interest to warrant such action.

TELEPHONE AND ELECTRIC LIGHT COMPANIES — LOCATIONS FOR
POLES AND WIRES — "PRIVATE WAY" — EMINENT DO-
MAIN — CONSTITUTIONAL LAW — COMPENSATION.

Assuming that the term "private way," in a proposed act entitled "An Act to authorize the granting to telephone and electric light companies locations for poles and wires upon private ways," is used in its technical sense, as referring to ways laid out under the provisions of R. L., c. 48, § 65, such way is in fact a public way; and the Legislature may authorize the grant of locations for poles and wires upon or along private ways, without provision for compensation for damages occasioned thereby.

If, on the other hand, the term is used as referring to ways or lands held by private individuals, a statute assuming to authorize the location of poles and wires thereon, without provision for the recovery of damages by the owners, is unconstitutional.

The committee on mercantile affairs has submitted to me a draft of an act entitled "An Act to authorize the granting to telephone and electric light companies locations for poles and wires upon private ways," and the committee requests my opinion upon the question whether any of the provisions of said act are within constitutional prohibitions.

To the Com-
mittee on
Mercantile
Affairs.
1903
April 9.

I assume that the term "private way" is used in this act in its technical sense; that is, meaning a way laid out under the provisions of R. L., c. 48, § 65, and sections following. Such a way, although it be laid out for the use of a particular person or persons, upon whom the whole or any part of the damages may be assessed, is, nevertheless, a public way, because it exists through the adjudication of a public tribunal, and not through private contractual obligations, expressed or implied, between citizens. For the establishment of such private ways as the statute contemplates there must have been an adjudication and a taking by competent authority, for which taking due compensation must have been provided; and the easements or rights thus created are not limited as to their use or enjoyment to individuals or particular persons, for the ways have become branches and parts of public thoroughfares.

I am of opinion, therefore, that a statute authorizing the proper authorities to grant locations for telephone or telegraph poles upon or along private ways is not open to constitutional

objection, and it may be urged that the provisions of R. L., c. 122, § 1, now give such authority. It may therefore be doubted whether any new legislation is required to meet the apparent purpose of the proposed act.

If, however, the term "private way" in the act referred to means a way over private land, in which the public has no interest, the way and the land over which it passes both being private property (and I am informed that the proposed legislation is directed to such state of facts), the absence of any provision for compensation to the owners of such property seriously endangers its validity, on constitutional grounds.

There can be no question that the Legislature may grant the power to exercise the right of eminent domain to telephone and telegraph companies, or to agents who may exercise it in behalf of such companies; and I am of opinion that the Legislature may delegate this power to the mayor and aldermen of cities or to the selectmen of towns, to be exercised in the taking of land for such uses, provided, always, constitutional requirements are complied with. The act before me, however, contains no express provision for the recovery of damages, and merely applies, or seeks to apply, by reference, the statute regulating the granting of locations along the highways to the takings contemplated by it. The provision for damages contained in R. L., c. 122, to which reference is made in § 3 thereof, relates to owners of lands abutting upon a public way, and contemplates resulting damages occasioned by the erection and maintenance of poles, rather than for the taking of land or the creation of any new right impairing private property interests.

The provisions of the Revised Laws, above cited, in my opinion are not sufficient (for they do not extend, nor are they applicable, to the case of taking property by eminent domain) to secure constitutional rights to persons whose property is taken by the proposed act. I am, therefore, of opinion that reference to the above provisions of the Revised Laws does not bring the proposed act within constitutional limitations.

I am further of opinion that the term "private way," as used in the act submitted to me, upon established rules of construc-

tion, whatever be the intent of the Legislature, now entertained, will be held to be a private way as defined by existing statutory law; that is, a way established and dedicated through the exercise of the right of eminent domain by some tribunal of competent jurisdiction. I hold, therefore, that the act, in its present form, does not by its terms authorize the taking of private property or the invasion of private rights, and does not authorize the location of poles and wires upon private lands as such, but only within the limits of the statutory private way. I venture to suggest that the use of the words in the draft of the act, "owners of such private ways," is inartificial and ambiguous. A private way contemplated and defined by our statutes is not strictly private property, but, in a sense, belongs to the public, and is an easement dedicated by a constitutional adjudication to a quasi-public use.

CHIEF OF CATTLE BUREAU — ORDERS OR REGULATIONS —
APPROVAL — PUBLICATION — GOVERNOR AND COUNCIL.

R. L., c. 90, § 4, as amended by St. 1902, c. 116, § 3, which in part provides that no orders or regulations made by the Chief of the Cattle Bureau shall take effect until approved by the Governor and Council, and that such orders or regulations shall be published in the manner therein prescribed, requires that the method of publication shall be prescribed by such orders or regulations, and shall be subject to the approval of the Governor and Council.

I beg to report that I have considered the communication to Your Excellency from the Chief of the Cattle Bureau, with regard to the publication of the rules and regulations made by authority of R. L., c. 90, § 4, as amended by St. 1902, c. 116, § 3.

To the
Governor.
1908
April 29.

R. L., c. 90, § 4, provides as follows: —

The board may from time to time make orders and regulations relative to the prevention, suppression and extirpation of contagious diseases of domestic animals, and relative to the inspection, examination, quarantine, care and treatment or destruction of such animals which are affected with, or have been exposed to, such diseases, . . . and all orders and regulations made by the board shall be entered on its records and a copy thereof shall be sent to each inspector in the city or town to which the orders or regulations apply, *and be published by him in such manner as the orders or regulations may prescribe.*

St. 1902, c. 116, amended this provision by transferring the powers and duties of the Board of Cattle Commissioners to a Chief of the Cattle Bureau of the State Board of Agriculture; and further provided that no orders or regulations made by him, under authority of R. L., c. 90, §§ 4 and 7, should take effect until approved by the Governor and Council.

The Chief of the Cattle Bureau inquires of Your Excellency whether or not the method of publication should be defined in the rules and regulations which are approved by the Governor and Council, under the provisions of the act above referred to.

I am of opinion that R. L., c. 90, § 4, clearly requires that the method of publication of the rules and regulations provided for therein should be prescribed by such rules and regulations, and subject to the approval of the Governor and Council.

STREET RAILWAYS — BOSTON ELEVATED RAILWAY COMPANY —
LOCATION — METROPOLITAN PARK COMMISSIONERS — TAX
— CONTRACT — CONSTITUTIONAL LAW.

By St. 1897, c. 500, § 10, providing in part that during a period of twenty-five years from the date of the passage thereof no taxes or excises, not then actually imposed upon street railways, should be assessed upon the Boston Elevated Railway Company except as defined in such statute, a contract was created between the Boston Elevated Railway Company and the Commonwealth; and St. 1900, c. 413, § 2, authorizing the Board of Metropolitan Park Commissioners to grant to street railways locations over roadways, boulevards, parks and reservations subject to its control, "upon such terms, conditions and obligations, and for such compensation, as the public interests and a due regard for the rights of the Commonwealth may require," in so far as it relates to compensation for grants of location, is not applicable to such company.

The ultimate disposition of money received for taxes from the Boston Elevated Railway Company under the provisions of St. 1897, c. 500, § 10, forms no part of the contract created thereby, and may be changed or modified in such manner as the Legislature may deem proper. Such proportion of the taxes received from the Boston Elevated Railway Company as is based upon the mileage owned or controlled by such corporation within metropolitan park reservations may therefore be credited, under the provisions of St. 1900, c. 413, § 5, to the sinking fund created to meet the expenses of establishing and maintaining such reservations.

Your letter of April 14 requests my opinion upon certain questions which arise in connection with a proposed grant of location to the Boston Elevated Railway Company, and relate to the

To the Metro-
politan Park
Commission.
1903
April 30.

effect of St. 1900, c. 413, an act authorizing the Metropolitan Park Commission to grant street railway locations, upon St. 1897, c. 500, which defines and determines the rights and duties of the Boston Elevated Railway Company and the West End Street Railway Company.

You state that you desire to know the effect of § 5 of St. 1900, c. 413, upon § 10 of St. 1897, c. 500; and "more particularly whether any portion of the taxes and compensation to be paid under said § 10 by said railways to the Treasurer of the Commonwealth will, under said § 5 of c. 413 of St. 1900, be credited to the sinking fund of the loan under which the boulevard or park in which the location was granted by this Board was provided, or will all be distributed to the cities and towns within which the track is located; and, in either event, whether this commission has the right to require of the railway company additional compensation."

St. 1897, c. 500, an act to promote rapid transit in the city of Boston and vicinity, establishes in § 10 a toll or fare which may be charged by the railways above referred to, "which shall not exceed the sum of five cents for a single continuous passage in the same general direction upon the roads owned, leased or operated by it;" and further provides that this sum shall not be reduced by the Legislature during a period of twenty-five years from and after the passage of the statute. The remainder of the section is as follows: —

During said period of twenty-five years no taxes or excises not at present in fact imposed upon street railways shall be imposed in respect of the lines owned, leased or operated by said corporation, other than such as may have been in fact imposed upon the lines hereafter leased or operated by it at the date of such operating contract or of such lease or agreement hereafter made therefor nor any other burden, duty or obligation which is not at the same time imposed by general law on all street railway companies: *provided, however*, that said corporation shall be annually assessed and shall pay taxes now or hereafter imposed by general law in the same manner as though it were a street railway company, and shall, in addition, as compensation for the privileges herein granted, and for the use and occupation of the public streets, squares and places, by the lines of elevated and surface railroad owned, leased and operated by it, pay to the Commonwealth, on or before the last day

of November in each year, during said period of twenty-five years, an annual sum, the amount of which shall, in each year ending the last day of September, be determined by the amount of the annual dividend paid in that year by said corporation, in the following manner: If the annual dividend paid is six per cent. or less, or if no dividend is paid, the sum payable that year shall be a sum equal to seven-eighths of one per cent. of the gross earnings of all the lines of elevated or surface railroads owned, leased or operated by said corporation; if said dividend exceeds six per cent. then a sum equal to the excess of the dividends over six per cent. in addition to said seven-eighths of one per cent. of said gross earnings. The above sum shall be paid into the treasury of the Commonwealth and distributed among the different cities and towns in proportion to the mileage of elevated and surface main track, reckoned as single track, which is owned, leased or operated by said corporation and located therein.

St. 1900, c. 413, provides in § 1 that the Board of Metropolitan Park Commissioners shall have authority to grant locations as therein provided to street railways within the roads, boulevards, parks and reservations in its care and control. Section 2 provides that, after due notice and hearing, "if in the opinion of the board public convenience and necessity so require," it may grant such location or any part thereof upon such terms, conditions and obligations and for such compensation as the public interests and a due regard for the rights of the Commonwealth may require. Section 5 is as follows: —

The share of the tax paid by any street railway company operating hereunder, into the treasury of the Commonwealth, which would under other provisions of law be apportioned to the city or town within which its tracks laid hereunder are situated, shall be apportioned to the Commonwealth and credited by the treasurer to the sinking fund of the loan to which the expenditure for the road, boulevard, park or reservation in which the tracks are located was charged.

St. 1897, c. 500, is a special act, limiting and defining the duties, rights and privileges of particular corporations; and the regulations and conditions thereby made applicable to such corporations would, under the ordinary rules of statutory construction, remain unaffected by a later general enactment upon the same subject. Section 10, moreover, which fixes a minimum toll

or fare which for a period of twenty-five years may not be altered or reduced by the Legislature, and provides the method of taxation of the corporations which are within its terms, also establishes the manner and rate of compensation to be paid by the Boston Elevated Railway Company for the use and occupancy of the public streets, squares and places over which its tracks may be laid; and in the matter of such compensation, as well as in respect of the amount of the fare which may be charged and the method of taxation to be adopted, constitutes a contract which may not be altered or impaired by subsequent legislation. 2 Op. Atty.-Gen. 261.

Such compensation is to be paid annually to the Commonwealth during a period of twenty-five years, and is to be determined in each year by the annual dividend for that year. If such dividend does not exceed six per cent., the sum paid to the Commonwealth as compensation for the use of public streets and ways is to be equal to seven-eighths of one per cent. of the gross earnings of all the lines of elevated or surface railroads owned, leased or operated by the Boston Elevated Railway Company. If it exceeds six per cent., an additional sum is to be paid, equal to the excess of such dividend over six per cent. The money so received is to be paid into the treasury of the Commonwealth, and thereafter distributed among the different cities and towns in proportion to the mileage of elevated and surface main track which is owned, leased and operated by such corporation in each city or town.

I am of opinion that it was the purpose of the Legislature by these provisions to establish a rate of compensation for the use of public streets, ways and squares by the Boston Elevated Railway Company, which, for a period of twenty-five years, should be payment in full for such use and occupation; and that the method and rate of compensation so established form an important element in the contract between the Commonwealth and the railroad company, which cannot constitutionally be altered or amended for the purpose or with the effect of subjecting such corporation to the burden of any additional payment on account of the use and occupation of public streets or ways. That such

would be the effect of applying the provisions of St. 1900, c. 413, § 2, to the corporation in question cannot be doubted. The sum annually due to the Commonwealth as compensation for such use and occupancy is based upon the gross earnings of *all* the lines owned or controlled by it; and if, upon the granting of the right to lay tracks over land within the jurisdiction of the Metropolitan Park Commission, a further charge should be imposed therefor, it would result that the corporation would pay in compensation for such privilege not only the proportionate part of the amount annually due the Commonwealth under the provisions of St. 1897, c. 500, § 10, based upon the gross earnings of that particular line of track, but also the compensation fixed and determined by the commission under the provisions of St. 1900, c. 413, § 2, — an additional charge, not contemplated or provided for in the original contract. It follows, therefore, that the Metropolitan Park Commission is not authorized to require of the Boston Elevated Railway Company, under the provisions of St. 1900, c. 413, § 2, any additional compensation for the right to occupy roads, boulevards, parks and reservations under its care and control.

The second question submitted deals with the disposition of the taxes paid by the Boston Elevated Railway Company, under the provisions of St. 1897, c. 500, § 10, to the Treasurer of the Commonwealth. By this section it is provided that the taxes paid by such corporation into the treasury of the Commonwealth shall be distributed among the different cities and towns in proportion to the mileage of track owned, leased or operated by it within the limits of each city or town. St. 1900, c. 413, § 5, provides that, where locations are granted in boulevards, parkways or open places controlled by the Metropolitan Park Commission, that proportion of the tax which would be ultimately paid to the city or town in which such parkways, boulevards or open places are located, if they were not under the control of the Commonwealth, shall be apportioned to the Commonwealth, and credited by the Treasurer to the sinking fund of the loan created to meet the expenses of that particular work.

I am of opinion that the ultimate disposition of money re-

ceived for taxes under the provisions of St. 1897, c. 500, § 10, forms no part of the contract created thereby, and may be changed or modified in such manner as the Legislature may deem proper, without constituting a violation of the contractual relation subsisting between the Commonwealth and the Boston Elevated Railway Company; since the corporation can have no further interest in such money after payment to the Commonwealth, and no additional burden or obligation is imposed upon it by crediting a portion of the amount so paid to the sinking fund of a metropolitan park loan, instead of distributing such portion to the various cities and towns through which its tracks extend. The provision of St. 1900, c. 413, § 5, that such proportion of the taxes received from the Boston Elevated Railway Company as is based upon the mileage owned or controlled by such corporation within metropolitan park reservations may be credited to the sinking fund of the loan created to meet the expenses of establishing and maintaining such reservations, is therefore applicable to the sums received as taxes from such corporation under the provisions of St. 1897, c. 500, § 10.

FLATS — PLANTING AND CULTIVATION OF OYSTERS — LICENSES
— CITY OR TOWN AUTHORITIES — BOUNDARIES.

Under R. L., c. 91, §§ 104 and 105, the authority of the mayor and board of aldermen in cities, and of the selectmen in towns, to grant licenses for the planting and cultivation of oysters upon flats between high and low water mark, is limited to licenses for the placing of shells upon such flats, upon written consent of the owner thereof; and all other operations connected with the cultivation or digging of oysters must be carried on below mean low-water mark.

R. L., c. 91, § 105, does not require that the licenses granted thereunder shall specify the shore line in feet, if reference may be otherwise made to metes and bounds which are readily ascertainable.

I have your letter of March 28, requesting my opinion upon the construction of R. L., c. 91, §§ 104 and 105, relative to the granting of licenses for the growing and digging of oysters.

The selectmen of towns are local officers, and as such are not entitled to the opinion of the Attorney-General; but, inasmuch

To the Board
of Selectmen
of Wollfleet.
1908
May 7.

as the question is one of general importance, and, in a measure, involves rights of the public and of the Commonwealth, I have deemed it expedient to submit for your guidance my views upon the subject.

R. L., c. 91, § 104, is as follows:—

The mayor and aldermen of a city or selectmen of a town may, by writing under their hands, grant a license for a term not exceeding ten years to any inhabitant thereof to plant, grow and dig oysters at all times of the year, or to plant oyster shells for the purpose of catching oyster seed, upon and in any waters, flats and creeks therein, at any place where there is no natural oyster bed; not, however, impairing the private rights of any person, nor materially obstructing any navigable waters.

Section 105 provides that—

Such license shall describe by metes and bounds the waters, flats and creeks so appropriated and shall be recorded by the city or town clerk before it shall have any force, and the licensee shall pay to the mayor and aldermen or selectmen, for their use, two dollars, and to the clerk fifty cents. The shore line of such licensed premises shall be the line of mean low water for the planting and growing of oysters, and the line of high water for the planting of oyster shells, but the provisions of this section shall not authorize the placing of such shells upon the land of a riparian owner between high and low water mark without his written consent.

By the first of the above sections the mayor or aldermen of a city or the selectmen of a town are authorized to grant licenses, under certain conditions, first, to grow and dig oysters at all seasons of the year; and, second, to plant oyster shells for the purpose of catching oyster seed upon and in any waters, flats and creeks within the limits of such city or town at any place where no natural oyster bed is found. Section 105 provides that the shore line of such licensed premises shall be the line of mean low water for the planting and growing of oysters, and, with the consent in writing of the riparian owner, the line of high water for the planting of oyster shells.

The effect of this provision is to limit the right of the selectmen to grant licenses for the digging and growing of oysters to

flats below low-water mark, and to distinguish such licenses from those which, with the consent of the riparian owner, permit the placing of oyster shells upon the flats between high and mean low-water mark. The apparent purpose of this distinction is to permit the licensee to place oyster shells upon the land of the riparian proprietor between high and low water mark, in order to catch the oyster seed or "spat," which are brought by the currents into contact with and adhere to such shells. The shells so placed, and to which the growing oysters are attached, may then be removed to other beds below mean low-water mark, with the result of improving the size and quality of the oysters.

The digging of oysters, however, might constitute a serious interference with private rights; and for this reason, as well as for the reason that growing oysters must be constantly covered by water, the further cultivation and the harvesting of oysters if planted must be carried on below low-water mark.

I am therefore of opinion that the statute above quoted limits the authority of your board to the granting of licenses for the placing of shells upon flats between high and low water mark, and then only with the written consent of the riparian owner, and that all further cultivation and digging of oysters must be conducted below mean low-water mark.

Your letter contains the further question, whether a "lease for the cultivation of oysters below mean low-water mark may be granted with a shore bound without the number of feet being specified on the shore.'

I am of opinion that the requirement of the statute that the licenses shall describe by metes and bounds the waters, flats and creeks so appropriated, does not require the shore line specified in feet, if reference is otherwise made to metes and bounds which are readily ascertainable. As a matter of practice, however, it would seem preferable that, wherever it is possible, the license should specify the distance in feet.

EXTRADITION — ATTORNEY-GENERAL — EXPEDIENCY — GOVERNOR — GOOD FAITH OF AFFIDAVIT OF COMPLAINING WITNESS.

The duty of the Attorney-General to advise the Executive upon questions of expediency in matters of extradition, as required by R. L., c. 217, § 12, can only arise in cases of demands made upon the Governor for the surrender of persons held in custody or under recognizance in this Commonwealth to answer for crime, or by virtue of any civil process.

In the case of an application for the issuance of a demand for extradition upon another State, the Executive of this Commonwealth is not to be controlled by the allegations contained in such application, and should satisfy himself upon the truth of every material fact alleged therein. He may inquire, therefore, if there be doubt in his mind, as to the good faith of the affidavit of the principal complaining witness, required by the rules for the practice of interstate rendition in cases of fraud, false pretences or embezzlement, and setting forth that the sole purpose for which extradition is sought is the punishment of the accused, and that such witness does not intend to use the prosecution for any private purpose.

To the
Governor.
1908
May 25.

I have the honor to report that I have examined the application of the district attorney for Suffolk County for a requisition upon the Governor of the State of New York for the extradition of Moody Merrill, charged by indictment with the crime of embezzlement and larceny, together with the papers accompanying such application, and have heard the parties appearing in remonstrance to the issuance by Your Excellency of the requisition sought to be obtained.

R. L., c. 217, § 12, by virtue of which the papers in this case are now before me, is as follows: —

Upon such demand or application, the attorney-general or a district attorney shall, if the governor so requires, forthwith investigate the grounds thereof, and report to the governor all the material facts which may come to his knowledge, with an abstract of the evidence in the case, and, in case of a person demanded, whether he is held in custody or is under recognizance to answer for a crime against the laws of this commonwealth or of the United States or by force of any civil process, with an opinion as to the legality or expediency of complying therewith.

Under this section the duty and authority of the Attorney-General in the premises must, in my opinion, be limited to making an investigation into the grounds of the application,

and reporting to Your Excellency such material facts as may be brought to his knowledge, together with an abstract of the evidence in the case; and his power to advise Your Excellency upon the expediency of granting such application must be strictly confined to cases of demands made upon Your Excellency for the extradition of persons held in custody or under recognizance in this Commonwealth to answer for crime, or by virtue of any civil process. Upon this construction of the statute, and in accordance with its provisions, I have the honor to submit for Your Excellency's consideration the following report.

With regard to the papers submitted to me and accompanying the application of the district attorney for Suffolk County, I have to advise Your Excellency that, in my opinion, the provisions of the United States statute regulating the matter of extradition (Rev. St. of U. S., § 5278) and of the Massachusetts statute upon the same subject (R. L., c. 217, § 11) have been in all respects complied with. The papers, as at first laid before me, were not technically in proper form, in that they did not contain the affidavit of the principal complaining witness, setting forth that the application is made in good faith, and that such witness does not expect to and will not use the prosecution for the collection of a debt or for any purpose, as required by the rules for the practice of interstate rendition which are applicable to requisitions issued by Your Excellency; this omission was, however, subsequently remedied by the filing of the affidavit as required, and the papers, as they now appear, are in accordance with the requirements of law and of the rules above mentioned, and therefore in legal and proper form.

I am of the opinion that the Executive may well hold that every presumption of fact should attach to the allegations made by the district attorney, when that officer himself applies for the extradition. This presumption may, in cases, be rebutted by evidence; but none such has been submitted to me, and I am of opinion that the presumption holds in favor of this application. But, beyond the application of the district attorney, and necessary for its support, is the required affidavit of good faith by the party complaining, upon whose allegations the prosecu-

tion rests. Such affidavit, in form sufficient, accompanies the papers. Since its presentation is itself a condition precedent to the issuance of the Executive demand upon a foreign State, which demand is, in effect, a pledge of the good faith of the demanding State, it follows that the Executive should satisfy himself that the affidavit is in fact true; for, if false, it may well be treated in the Executive discretion as a nullity.

The Executive has the right to require, therefore, if there be doubt in his mind, that the truth of the affidavit be established to his satisfaction. Evidence by the remonstrants was offered as tending to disprove the allegations of the affidavit, but, as offered and presented before me, it was not, in my opinion, sufficient to support the remonstrants' contention; and, in the absence of other and more conclusive evidence, I am constrained to advise Your Excellency that the papers are in proper form, and that there appears to be no reason why the application of the district attorney for Suffolk County may not be granted.

INTOXICATING LIQUORS — IMPORTATION AND SALE — ORIGINAL PACKAGE.

The Legislature, since the enactment of 26 U. S. Sts. at Large, 313, providing that "all fermented, distilled, or other intoxicating liquors or liquids transported into any state or territory . . . shall, upon arriving in such state or territory be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory," has authority to repeal R. L., c. 100, § 33, which permits the sale of intoxicating liquors in the original casks or packages of importation, and to enact laws subjecting the possession, use or sale of such liquors within the limits of the Commonwealth, to all the restrictions and penalties imposed upon the possession, use or sale of other intoxicating liquors therein.

To the
Governor.
1908
June 1.

Your Excellency requires my opinion upon the present status of the statutory law of this Commonwealth with relation to the keeping for sale or sale of intoxicating liquors in the original packages of importation from another State.

Section 33 of c. 100 of the Revised Laws has been in force in

substantially its present form for many years. Its existing provisions are as follows:—

Importers of liquor of foreign production which is imported under authority of the laws of the United States may own, possess, keep or sell such liquor in the original casks or packages in which it was imported and in quantities not less than those in which the laws of the United States require such liquor to be imported, and, when sold, it shall be as pure and unadulterated as when imported.

The original enactment was doubtless for the purpose of giving recognition in our law to the requirement of the federal constitution with relation to commerce between the States; and until Congress should have suspended the exclusive control of interstate merchandise, the States had no authority, by police regulation or otherwise, to restrict or interfere with free importation and exportation between the States. Until the enactment of the so-called Wilson bill (26 U. S. Sts. at Large, 313), in 1890, this restraint upon State legislation continued in force; but by that bill it was provided "that all fermented, distilled, or other intoxicating liquors or liquids transported into any state or territory or remaining therein for use, consumption, sale or storage therein, shall, upon arrival in such state or territory be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

Congress thereby delegated authority to the several States to make such police regulations as they might deem necessary with regard to intoxicating liquors transported therein to be there used, consumed, sold or stored. Since the enactment of this federal statute it has therefore been competent for the Legislature to remove the protection theretofore offered to intoxicating liquors in the original packages of importation, and to subject said liquors kept here for use, sale or storage to the penalties and restrictions applicable to all other intoxicating liquors.

I assume that the General Court has not been called upon to exercise the authority now and since 1890 vested in it; at all events, no legislation in this State has followed the changed conditions due to the enactment of the Wilson bill. It is evident that the controlling reason for the immunity of liquors in the original packages no longer exists, and the Honorable Senate and House of Representatives may well consider the expediency of eliminating from our statutes a law which now appears to have little reason and no necessity for its justification.

Aside from the questions of public welfare as affected by the sale of intoxicating liquors, it is obvious that the operation of the provisions of § 33 of c. 100 of the Revised Laws is to give what would seem to be a wholly unwarranted privilege or preference to certain liquors not attaching to others; and to permit certain persons, without any of the restrictions provided by the license laws, to keep and sell intoxicating liquors in conflict with the entire spirit of our law, and in unrestrained competition with those persons who have, in obedience to the requirements of our legislation, subjected themselves to serious liabilities and to large expenditures to secure and avail themselves of a license to engage in the liquor trade.

Were the section of the Revised Laws above quoted to be repealed, all protection heretofore attaching to liquors in the original package of importation, but within this State for use, distribution, storage or sale, would be withdrawn; and after such repeal, all intoxicating liquors and those engaged in commerce therein would be subject to uniform and consistent provisions of law.

The present condition of our statutes would seem to indicate either that public opinion or the legislation of our Commonwealth has not kept pace with that of the federal Congress, and that Massachusetts has not availed herself of an opportunity that the federal government long since offered to her.

VOLUNTEER MILITIA — RIFLE RANGES — USE BY UNITED
STATES TROOPS — ADJUTANT-GENERAL.

The Adjutant-General has no authority either to grant or to refuse permission to United States troops to use the rifle ranges furnished under the provisions of R. L., c. 16, § 105, for the use of the volunteer militia, by the several cities and towns.

The only provision relating to rifle ranges for the use of the volunteer militia is R. L., c. 16, § 105, which in part provides that it shall be the duty of the mayor and aldermen and selectmen to "provide for each regiment, battalion, corps of cadets, or portion of the volunteer militia, within the limits of their respective cities and towns, . . . suitable places for parade, drill and target practice." Provision is elsewhere made in R. L., c. 16, for the control and management of armories by the Adjutant-General (§ 111), and for their use and occupation (§ 116), as well as for the maintenance of suitable places for drill (§ 113); but there is no specific enactment regulating the use and occupation of the rifle ranges which § 105 requires cities and towns to furnish.

To the
Adjutant-
General.
1908
June 1.

Under the provision above referred to, therefore, I am of opinion that it is the duty of cities and towns to establish and maintain, for the use of the local militia, suitable places for target practice; but that the use thereof by such militia need not necessarily be exclusive of all other use of such rifle range by the city or town within the limits of which it is situated. If reasonable opportunity for target practice is afforded to the volunteer militia, the statutory obligation of such city or town is fulfilled, and the duty of the Adjutant-General in the premises must be confined to securing such result.

It follows, therefore, that the Adjutant-General has no authority either to grant or to refuse permission to United States troops to use the rifle range now established in the city of Lynn, if such use does not in any respect interfere with or restrict the use of such rifle range by the volunteer militia. I am of opinion, however, that, if permission be given for the use of such rifle range by United States troops, it should be by specific action of the

city government of Lynn, the terms of such use and its limitations being definitely and exactly set forth, distinctly subordinating such use to the requirements and needs of the militia of this Commonwealth, and providing a summary right of revocation of the permission so accorded.

FOREIGN CORPORATIONS — INTERSTATE COMMERCE.

Foreign corporations, operating steamship lines between Boston and ports in other States or in foreign countries, which do no transportation business wholly within the Commonwealth, and no other business therein except such as is incidental to their foreign business, are engaged in the business of interstate and foreign commerce, the regulation of which is vested exclusively in the Congress of the United States, and are not subject to the provisions of R. L., c. 126, §§ 4 and 6, requiring foreign corporations having a usual place of business within the Commonwealth to appoint the Commissioner of Corporations their attorney for the service of legal process, and to file in the office of such commissioner certain sworn statements concerning their capital stock.

To the Com-
missioner of
Corporations.
1906
June 5.

In your letter of May 21 you ask my opinion upon the question whether certain foreign corporations, operating steamship lines between Boston and ports in other States and countries, which do no transportation business from point to point within the Commonwealth, or any local business, except such as is strictly incident to their foreign business, are subject to R. L., c. 126, §§ 4, 6. That statute provides that every foreign corporation, except foreign insurance companies, which has a usual place of business in this Commonwealth, shall, before transacting business in this Commonwealth, appoint the Commissioner of Corporations its attorney for the service upon it of legal process, and shall file in his office certain sworn statements concerning its capital stock.

The sole business of the companies in question is interstate and foreign commerce. The power of government to regulate it in the manner of the statute is vested exclusively in Congress, and, whether Congress has done all that is proper in that regard or not, the State has no jurisdiction to attach such conditions to the right of transacting it. Statutes requiring the filing of sworn statements and the appointment of a local attorney are

not included within those eminently local regulations made in the fair exercise of the police power of the State, which, in the absence of federal regulations over the same subject, are free from constitutional objections. It is, therefore, beyond the power of a State to make these requirements of such foreign companies. See *Crutcher v. Kentucky*, 141 U. S. 47; *Robbins v. Shelby County*, 120 U. S. 489; *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727.

In the first case, in which the court held invalid a statute providing that the agent of a foreign express company should not carry on business within this State without first obtaining a license, and satisfying the State Auditor that the company was possessed of a certain amount of capital, Bradley, J., by way of illustration, said: "Would any one pretend that a State Legislature could prohibit a foreign corporation — an English or a French transportation company, for example — from coming into its borders and landing goods and passengers at its wharves, and soliciting goods and passengers for a return voyage, without first obtaining a license from some State officer, and filing a sworn statement as to the amount of its capital stock paid in? And why not? Evidently because the matter is not within the province of State legislation, but within that of national legislation. . . . And the same thing is exactly true with regard to interstate commerce as it is with regard to foreign commerce."

It is to be presumed that the Legislature of Massachusetts, when it enacted the provisions of R. L., c. 126, §§ 4-6, knowing that it had no power to impose conditions upon foreign commerce, did not intend, in its use of the phrase "doing business in this Commonwealth," to include the business of transporting passengers and freight between the port of Boston and other States and countries. I advise you, therefore, that these provisions have no application to the companies in question.

CONSTITUTIONAL LAW — MAXIMUM DAY'S WORK — CITIES AND TOWNS — COUNTIES.

The Legislature may constitutionally limit the duration of a day's work for laborers, workmen and mechanics, employed by or in behalf of the Commonwealth, to a period of eight hours; but a like provision applicable to counties, and to cities and towns which have accepted the provisions of R. L., c. 106, § 20, making eight hours a day's work for the employees thereof, would be unconstitutional, as taking property without due compensation and without due process of law.

In respect of legislation fixing eight hours as a day's work for employees of counties, cities and towns, a county is not to be distinguished from a city or town.

To the
Governor.
1908
June 15.

Your Excellency has required my opinion upon the legal, and, more specifically, upon the constitutional, aspects of an act entitled "An Act to constitute eight hours a maximum day's work for public employees." The act contains the following provisions: —

That eight hours shall constitute a day's work for all laborers, workmen and mechanics employed by or on behalf of the Commonwealth or any county;

That every contract to which the Commonwealth or any county is a party, involving such employment, shall contain a stipulation that no such employee shall be permitted or required to work more than eight hours in any one day;

That the wages to be paid shall not be less than the prevailing rate for a day's work in the same trade or occupation in the locality where such public work is done;

That this act shall apply to all such employees engaged upon any works which are or are intended to be the property of the Commonwealth, or of any county therein, or of any city or town which has accepted the provisions of R. L., c. 106, § 20, whether such employees are employed by public authority, by a contractor, or by any other private person;

That any agent or official of the Commonwealth or of any county violating any provision of this act shall be subject to a penalty of fifty dollars for each offence;

That the provisions of the act shall not apply to contractors or sub-contractors under contracts made prior to the passage of the act, or to employees of charitable institutions.

If this were an act regulating the hours of labor and the amount of wages to be paid between individuals or private corporations and their employees, it would be, in my opinion, unconstitutional, as taking property without due compensation and without due process of law. It is not a mere declaration that, in the absence of special contract to the contrary, eight hours shall be a day's work, but it prohibits the making of any contract for a different number of hours' work. I am of opinion that it is not in the power of the Legislature to abridge or extinguish the right of parties to fix, by mutual consent, the number of hours that shall constitute a day's work, or the wages that shall be paid, or to prohibit or make void the agreements of the parties themselves in the premises, except where the health, safety or morals of the community are concerned, which justifies the enactment of police regulations, as in the case of restricting and defining the hours of employment of women and children (*Commonwealth v. Hamilton Manufacturing Co.*, 120 Mass. 383), or of persons working in an unhealthy employment (*Holden v. Hardy*, 169 U. S. 366).

The critical provisions of the statute before me are those made applicable only to laborers upon public works, either of the Commonwealth or counties, or of cities and towns which have accepted the provisions of R. L., c. 106, § 20. So much of the statute as applies to cities and towns which have accepted the act last cited is to my mind plainly unconstitutional, as upon reasons expressed in the opinion of the Attorney-General of April 24, 1901.¹ The chapter of Revised Laws cited merely provides what shall be a legal day's work, in the absence of an agreement by the parties to select, by mutual consent, some other standard or measure of service, analogous, in principle, to that of another statute fixing six per cent. as the legal rate of interest. See R. L., c. 73, § 3. The proposed enactment, on the other hand, provides that no laborer, workman or mechanic engaged upon any works which are or are intended to be the property of such city or town shall be permitted or required to work more than eight hours in any one day. It seems needless to specifi-

¹ *Ante*, p. 204.

cally call attention to that which is obvious, viz., that, by accepting the former eight-hour law, contained in the section of the Revised Laws above quoted, such cities and towns have not accepted, and do not accept, the provisions of this new enactment, even if it be assumed that they could have legally and in advance bound themselves to such an obligation.

The Attorney-General, in the opinion above referred to, assumed a distinction between a county and a municipal corporation, considering the former as a mere political subdivision of the Commonwealth, and, as such, having no private right in its own property, such as is possessed by municipalities. No reason is given for the distinction, and it appears to have been made rather by way of illustration in argument than as a formal adjudication; and the contrary has since been expressly held, in a well-considered decision by the Supreme Court of Indiana, where the legal status of a county was directly, rather than incidentally, adjudicated. *Street v. Varney Electrical Supply Co.*, 66 N. E. 895; 160 Ind. 338. I am therefore of opinion that, so far as this bill applies to counties, it is unconstitutional, for the reasons set forth in, and essential to, the conclusions in the above-cited opinion of the Attorney-General.

So far as the provisions of the new act relate to the Commonwealth, it is obvious that, beyond the objections that might well be made to a prescribed uniform wage for incompetent as well as competent employees, the bill, if approved, will result in a great increase of cost to the Commonwealth for all its public works; because it would seem that no contractor would bid for such work, in which unskilled labor is to be employed, except at figures predicated upon the highest rate of wages that might be current during the performance of the contract. There are decisions that such a regulation by the Commonwealth as to its own public works is unconstitutional. See *Ex Parte Kuback*, 85 Cal. 274; *State v. Norton*, 5 Ohio N. P. 183; *People v. Coler*, 166 N. Y. 1. But I am, nevertheless, of opinion that the Commonwealth may constitutionally establish such a rule for itself as it may choose; for it would be unavailing for any contractor or any employee to complain that his freedom of contract is

abridged by such an act, for he need not work in behalf of or for the Commonwealth unless he wishes to; and it is open to the Commonwealth to prescribe that all persons who do work for it, either directly or indirectly, shall be employed upon such terms as it may require.

There may be constitutional objection, but I do not think it conclusive to such a rule, made by the Commonwealth as principal, as shall require that all its agents shall pay their employees a particular or arbitrary price, greater than that which others of like capacity could earn for like service in an open market, and shall require them to work only a certain number of hours; for this, in effect, may be held to require the expenditure of money, raised by taxation, for the benefit of a special and preferred class of persons called laborers, workmen and mechanics. It is not wholly clear how far the Legislature may go in paying gratuities from the public treasury to any class of its citizens, whether directly and avowedly, or through the means of paying them a high price for short hours of labor; but this question must be largely determined by the discretion of the Legislature itself. See *Opinion of the Justices*, 175 Mass. 599.

It does not lie within my proper province to discuss the policy of the legislation, but I deem it not wholly inappropriate to suggest, as sustaining the reason of my opinion upon the legal aspects of the question, the axiomatic principle that citizens must, through taxes imposed upon them, pay for public works, are entitled to have such work done under such conditions of economy as they could themselves adopt in their own enterprises, through the employment of labor during as many hours in the day, and for as low wages, as the legitimate conditions of business might permit. The excess which is paid on account of short days and high wages, fixed without discrimination as to excellence of work, can differ but little in principle from a donation exacted from the tax payer and bestowed upon the laborer.

It is to be noted that the act distinguishes between employees upon public works in general and those who are in the service of charitable institutions. If the doctrine be sound, that the Commonwealth may make whatever rule it sees fit for the em-

ployment of labor upon its own works, I think it may make any discrimination as to employees, however arbitrary it may be. While citizens are entitled to the protection of equal laws, they are not equally entitled to be employed by the State, nor are they absolutely entitled to be employed upon equal terms. The Commonwealth, as proprietor, in making rules for its agents to follow, may exercise its own discretion, if prompted by the public welfare, even at the expense of its own interest, for the incidental benefit of some selected favorite. Therefore, though this discrimination against employees of charitable institutions may be ground for serious objection, in reason it is, I think, nevertheless constitutional.

So far as this act applies to hours of labor in public works of the Commonwealth, it is similar to the act of Congress of August 1, 1892 (27 U. S. Sts. at Large, 340). The validity of this act, so far as I can learn, has not yet been tested in the courts. The earlier United States statute (15 U. S. Sts. at Large, 77), which provided simply that, in the absence of a special contract, eight hours should constitute a day's work, was held to be valid, as merely prescribing a uniform rule to be followed by those agents when there was no reason why a different length of day should be contracted for.

PILOTS OF BOSTON HARBOR — PILOT COMMISSIONERS — ORDER
PRESCRIBING SPECIFIC CHANNEL.

Under the provisions of R. L., c. 67, § 2, and in the absence of regulations to that effect imposed by the Congress of the United States, the Pilot Commissioners have no authority to require that, when in charge of heavy vessels, pilots shall enter and leave the port of Boston by a specific channel.

To the Pilot
Commission-
ers.
1908
July 8.

In your letter of July 2 you state that you have been requested by the United States Engineer to order Boston pilots to enter and leave the port, when in charge of large, deep vessels, by the new Broad Sound Channel, and you require my opinion whether you have authority to issue such orders.

Section 4235 of the Revised Statutes of the United States provides:—

Until further provision is made by Congress, all pilots in the bays, inlets, rivers, harbors, and ports of the United States, shall continue to be regulated in conformity with the existing laws of the states respectively wherein such pilots may be, or with such laws as the states may respectively enact for the purpose.

R. L., c. 67, § 2, provides that the Pilot Commissioners shall cause the laws and regulations for pilotage within the harbor of Boston to be duly observed and executed.

The regulations for pilotage are found in St. 1862, c. 176, at the end of the chapter. These regulations do not provide for any determination by the Pilot Commissioners through which channel or channels vessels shall be taken, and I am not informed in your letter that the regulations have ever been altered in that respect.

Therefore, I am of opinion that you have no authority, of your own motion, to require pilots to take one channel, rather than another. If, however, the proper authorities of the United States government order that under certain circumstances vessels must pass out and in through Broad Sound Channel while the main ship channel is being repaired, and communicate such order to you, as the head of the pilots of Boston harbor, you should transmit the order to the pilots. The failure by any pilot to obey the order would be ground for his suspension, in accordance with R. L., c. 67, § 2.

PAUPER LAW — SETTLED PAUPER — LIABILITY FOR SUPPORT.

Where a pauper inmate of a State institution has a settlement in any city or town in this Commonwealth, such city or town is liable to the Commonwealth for his support, notwithstanding the fact that there may be kindred or other persons who are bound by law and are of sufficient ability to defray the expense incurred therefor.

In your letter of May 4 you state that in certain cases the overseers of the poor of cities and towns within the Commonwealth acknowledge the settlement of pauper inmates of State institutions to be in such cities and towns, but deny their lia-

To the Super-
intendent of
State Adult
Poor.
1903
July 13.

bility for the support of such persons, for the reason that they allege that there are relatives or kindred bound by law to support the pauper, who are of sufficient ability so to do.

R. L., c. 85, § 20, is as follows: —

A city or town in which an inmate of the state hospital is found to have a legal settlement shall be liable to the commonwealth for his support in like manner as one town is liable to another in like cases; and in such case, the state board of charity shall adopt such measures relative to notice, removal of a pauper and recovery of expenses as are prescribed for towns in like cases.

Section 21 provides that: —

The kindred who are liable by law to towns for expenses in supporting such paupers shall in like manner be liable to the commonwealth for any expense incurred for such paupers; and the state board of charity may adopt the same measures and institute like proceedings for the recovery of such expenses from the kindred so liable as are prescribed for towns in like cases.

I am of opinion that where a pauper, an inmate of a State institution, has a settlement in any city or town within this Commonwealth, such city or town is liable for his support, notwithstanding the fact that there may be some person or persons who are bound by law and who are able to defray the expense incurred by the Commonwealth.

It is true that under the provisions of § 21, above quoted, the Commonwealth has an alternative remedy against the kindred of a pauper, should they be in a position to aid in his support; but the liability for the maintenance of settled paupers who are inmates of State institutions is primarily imposed upon the cities and towns in which such paupers have settlements; and it can hardly be maintained that a city or town could successfully defend a claim brought by the Commonwealth under the provisions of R. L., c. 85, § 20, upon the ground that the kindred of the pauper for whose support the action was brought were also liable.

TRADING STAMP — DEFINITE ARTICLE — EXCHANGE.

A trading stamp company may, under St. 1903, c. 386, issue trading stamps to merchants, for delivery to their customers, upon condition that a certain number of such stamps may be exchanged by the holder thereof for a definite and specified article, on inspection at the store of such company; and the customer, after receiving the article specified, may further exchange it for any other article of equal value exhibited at such store, without violating the provisions of such statute.

St. 1903, c. 386, provides that no person, firm or corporation shall, in connection with the sale of any merchandise, deliver trading stamps or similar devices, to be exchanged for any indefinite or undescribed article, the nature and value of which are not stated, or to be exchanged for any article not distinctly bargained for at the time when such trading stamps or other devices were delivered. You ask my opinion as to whether the following transaction is prohibited by this law: —

A trading stamp company issues to merchants stamps to be delivered to their customers, upon condition that a certain number of stamps may be exchanged by any customer for a rocking chair valued at \$4, similar to other rocking chairs on inspection at the company's store. When the stamps are delivered to the customer, it is agreed between the merchant and the customer that in exchange for a certain number of them the customer may receive a rocking chair valued at \$4, similar to other rocking chairs on inspection at the company's store. It is further provided that if, after receiving the rocking chair in exchange for the stamps, the customer desires to exchange the chair for some other article in the store which is valued at the same price, he may do so.

In my opinion, this transaction is not a violation of the above statute.

To the Chief
of the Massa-
chusetts Dis-
trict Police.
1908
July 21.

STATE INSPECTOR AND ASSAYER OF LIQUORS — CERTIFICATE —
EVIDENCE — STATE BOARD OF HEALTH.

The provision of R. L., c. 100, § 67, which made the certificate of the State inspector and assayer of liquors *prima facie* evidence of the composition and quality of liquors examined by him, is not affected as to the competency of such certificate as evidence by the fact that, under St. 1902, c. 110, the office of State inspector and assayer of liquors was abolished, and the powers and duties of such officer were transferred to the State Board of Health.

To the State
Board of
Health.
1906
July 22.

You inquire in your letter of July 14 as to the effect of St. 1902, c. 110, upon R. L., c. 100, §§ 67 and 68, particularly with regard to the provision contained in R. L., c. 100, § 67, that the statement of the inspector and assayer of liquors with regard to the percentage of alcohol found by him in samples of liquors submitted to him shall be *prima facie* evidence of the composition and quality of the liquors to which it relates. The sections in chapter 100 of the Revised Laws to which you refer established the duties of the State inspector and assayer of liquors, among which was the duty to "inspect and analyze all liquors sent to him by the licensing board of any city, the selectmen of any town, or by police officers or other officers who are authorized by law to make seizures of liquors." The result of his examination and analysis was to be embodied in a certificate signed by him "of the percentage of alcohol by volume at sixty degrees Fahrenheit which such samples of liquors contain." The section further provides that such statement shall be *prima facie* evidence of the composition and quality of the liquors to which it relates.

St. 1902, c. 110, is entitled "An Act to transfer the powers and duties of the inspector and assayer of liquors to the state board of health," and is as follows: —

SECTION 1. The office of inspector and assayer of liquors is hereby abolished.

SECTION 2. The powers and duties heretofore conferred and imposed on the inspector and assayer of liquors are hereby conferred and imposed on the state board of health.

The obvious purpose of this statute was to transfer to the State Board of Health the powers and duties of the inspector

and assayer of liquors, one of which was to examine samples of liquors seized by the police authorities, and to prepare a certificate setting forth the results of his examination, which should be *prima facie* evidence of the composition of the liquors analyzed.

I have no hesitation in advising you that the weight of such certificate as evidence remains unaffected by the enactment of St. 1902, c. 110.

HIGH SCHOOL — LENGTH OF COURSE OF STUDY — TUITION — PAYMENT BY TOWN.

The effect of the provision in R. L., c. 42, § 2, that in a high school established thereunder "one or more courses of study, at least four years in length, shall be maintained," is to fix a minimum and not a maximum length for such course, and, in the discretion of the school committee, the course of study thereat may be made to exceed four years in length.

Under R. L., c. 42, § 3, providing that towns relieved of the duty to maintain a high school of their own shall pay the expenses of tuition of residents therein who attend high schools in other towns, a pupil residing in a town which does not maintain a high school, and attending a high school elsewhere, who fails to graduate in due course, may be allowed a reasonable time in excess of that prescribed for the completion of such course; or such pupil, if graduated in due course, may pursue an additional or post-graduate course for the purpose of securing admission to a State normal school, technical school or college, provided such additional course includes only studies required by law to be taught in high schools.

On the other hand, a pupil resident in a town in which no high school is maintained, and attending a high school in another town, who pursues an additional or post-graduate course which includes studies not required to be taught in high schools of corresponding grade, cannot be reimbursed by the town of his residence for the expense of tuition incurred in taking such course.

You require my opinion upon certain questions relating to the construction of R. L., c. 42, § 3, as amended by St. 1902, c. 433, as follows: —

To the State
Board of
Education.
1908
August 17.

"1. Does the law contemplate a regular four years' course in the high school, and no more?

"2. If a student so attending in some other town or city wishes to take a post-graduate course for a year, more or less, or if a student fails to graduate at the end of the four years' course, and wishes to attend longer, is the town liable in either case for the tuition in excess of the four years' course?"

R. L., c. 42, § 3, which, so far as it is material to the present inquiry, is not affected by the amendment enacted in St. 1902, c. 433, provides that:—

A town of less than five hundred families or householders in which a public high school or a public school of corresponding grade is not maintained shall pay for the tuition of any child who resides in said town and who, with the previous approval of the school committee of his town, attends the high school of another town or city. If such town neglects or refuses to pay for such tuition, it shall be liable therefor to the parent or guardian of a child who has been furnished with such tuition if the parent or guardian has paid for the same, and otherwise to the city or town furnishing the same, in an action of contract. If the school committee of a town in which a public high school or public school of corresponding grade is not maintained refuses, upon the completion by a pupil resident therein of the course of study provided by it, to approve his attendance in the high school of some other city or town, which he, in the opinion of the superintendent of schools of the town in which he is resident is qualified to enter, the town shall be liable in an action of contract for his tuition. A town whose valuation does not exceed five hundred thousand dollars shall be entitled to receive from the treasury of the commonwealth all necessary amounts which have been actually expended for high school tuition under the provisions of this section, if such expenditure shall be certified under oath to the board of education, by its school committee within thirty days after the date of such expenditure, and such high school shall have been approved by the board of education.

Section 2 provides in part that every city and town containing, according to the latest census, five hundred families or householders, shall, and any other town may, maintain a high school, in which instruction shall be given in certain studies prescribed by § 1 of the same chapter, and in such additional subjects as may be required for the general purpose of preparing pupils for admission to State normal schools, technical schools and colleges. The section contains the further provision that "one or more courses of study, at least four years in length, shall be maintained in said high school."

Upon consideration of the provisions of law above referred to, I am of opinion that the statute is not to be construed to limit the duration of any course of study to a period of four years. The force and effect of the words "at least four years in

length," as used in § 2, is to establish a minimum and not a maximum length for such courses; and, in the discretion of the school committee of a town in which a high school is situated, the courses of study thereat may exceed four years in length.

In the case of a pupil attending a high school maintained by a town other than that in which he resides, who fails to graduate in due course, I am of opinion that a reasonable time in excess of that prescribed may be allowed for the completion of the course, subject always to the decision of the competent authorities that such additional attendance will be of advantage to the pupil himself. If the pupil himself elects to continue his studies beyond the regular and fixed course of study at the school which he attends, by taking a "post-graduate" course, so called, the question is one of more difficulty. If it be assumed that by post-graduate course is meant a course of study additional to and following upon the usual and regular course given at such high school, and including studies which are not required to be taught in high schools or schools of corresponding grade, I am of opinion that the town in which such pupil resides, and in which no high school is maintained, may not be charged with the expense so incurred, since the course of study chosen is not one which the town is obliged by law to furnish. If, on the other hand, the additional course includes only such studies as are by law required to be maintained in high schools, and is chosen by the pupil for the purpose of securing admission to a State normal school, technical school or college, and for the reason that the regular course of study maintained at such school is not sufficient in and of itself to secure the desired result, the expense incurred for such additional attendance constitutes in my opinion a proper charge against the town in which such pupil has his residence.

METROPOLITAN PARK COMMISSION — POLICE JURISDICTION —
PARKS — LOCAL POLICE — RIGHT OF ENTRY.

The authority of the Metropolitan Park Commission with regard to police regulation of public open spaces does not differ from that exercised by such commission over parkways and boulevards; and the entrance thereon of local police authorities, as such, must be limited to the pursuit and apprehension of persons who have violated some statute, ordinance or regulation within their jurisdiction, and have sought refuge upon land controlled by such commission.

To the Metro-
politan Park
Commission.
1908
August 21.

You inquire in your communication of August 13 as to the extent of the authority of the police appointed by a city or town within the limits of land taken for public open spaces under St. 1893, c. 407, the act by which your commission was created and established.

The legislation relating to this question was cited and elaborately discussed in an opinion addressed to the Metropolitan Park Commission, under date of August 7, 1902,¹ in which I advised the commission that the authority of the local police to enter upon roadways and boulevards exclusively controlled by the Metropolitan Park Commission is confined to the pursuit and apprehension of persons who have committed a breach of any statute, ordinance or regulation within the limits of an adjacent city or town, and have taken refuge upon such roadways or boulevards; and that they have no authority to enter upon roadways or boulevards subject to the jurisdiction of the commission for the general purpose of maintaining the public peace and order thereon.

The only ground for believing that a distinction may be made between the authority which the commission may exercise over public open spaces acquired under the provisions of St. 1893, c. 407, to which your present inquiry is directed, and the authority of the commission over roadways and boulevards, as defined in the opinion above referred to, is found in the language of St. 1894, c. 288, § 3, which is in part as follows: —

In furtherance of the powers herein granted said board may appoint clerks, police and such other employees as it may from time to time find

¹ *Ante*, p. 363.

necessary for the purposes of this act, remove the same at pleasure, and make rules and regulations for the government and use of the roadways or boulevards under its care, breaches whereof shall be breaches of the peace, punishable as such in any court having jurisdiction of the same; and in addition said board shall have the same rights and powers over and in regard to the roadways or boulevards taken and constructed hereunder as are or may be vested in them in regard to other open spaces by said chapter four hundred and seven and acts in amendment thereof and in addition thereto, *and shall also have such rights and powers in regard to the same as, in general, counties, cities and towns have over public ways under their control.*

The concluding provision of the above-quoted statute, by which the commission is given all the rights and powers with regard to parkways and boulevards that the local authorities have over public ways subject to their control, does indeed confer upon the commission rights and powers over such ways which are not included in the authority granted to the commission in dealing with public open spaces or reservations; but I am of opinion that the rights and powers so conferred are to be construed as relating rather to the granting and use of street railway and other franchises and like matters, which are peculiar to the control and use of public ways, than to matters of police jurisdiction over such ways.

It follows, therefore, that the authority of the Metropolitan Park Commission with regard to police regulation of public open spaces does not differ from that which they have over parkways and boulevards, as defined in the opinion of last year, already referred to; and that the entrance of the local police authorities, as such, in the discharge of their duties, upon such open spaces must be solely for the purpose of pursuing and apprehending persons who have violated some statute, ordinance or regulation within their jurisdiction, and have sought refuge upon lands controlled by your commission.

COMMONWEALTH — ACTIONS BY AGENTS OR REPRESENTATIVES
— ENTRY FEE.

In all cases where proceedings are instituted by persons appearing and acting as duly authorized agents or representatives of, and for the establishment or protection of any right or interest in, the Commonwealth, the Commonwealth is the plaintiff in such action, within the meaning of R. L., c. 204, § 6, par. 11, and no entry fee is chargeable therefor.

To the Clerk
of the Supreme
Judicial Court
of Suffolk
County.
1908
September 17.

Your letter under date of September 15, 1903, in relation to the payment of entry fees by the Commonwealth, is before me. I appreciate the importance of the question in its relation to your duties as clerk, and realize that, upon your request, I ought to advise you by formal opinion of the reasons for holding that the entry fees in the cases under consideration are not chargeable against the Commonwealth.

It is provided by R. L., c. 204, § 6, par. 11, that "in civil actions in which the Commonwealth or a county is the plaintiff, no entry fee shall be paid."

No question, I take it, can arise where the Commonwealth is in name as well as in fact the plaintiff or petitioner. The only field of question I assume to be where the party plaintiff is a commission or officer of the Commonwealth, suing as such. Obviously, where commissioners or officers have been created by law and intrusted with the care and enforcement of particular and specific rights of the Commonwealth, action must be taken exclusively by such officer or commission for and in behalf of the Commonwealth; and in order to show such authority to sue, such officer or commission must be named with the specification of his representative capacity. A proceeding for relief, remedy, redress or restraint for and in behalf of the Commonwealth, and brought in the name of those agents to whom the subject-matter of the proceeding has been expressly delegated by law, must, in my opinion, be taken to be, under the provisions of the section of the statute above referred to, a civil action, in which the Commonwealth is the plaintiff. The agent, except in his purely representative capacity, has no interest in or concern with the proceeding or its results; he is only the instrument by which the Commonwealth acts.

These conclusions, I think, must follow upon a consideration of the provisions of the statute unaided by judicial instruction. I believe, however, that the conclusion is positively sustained and confirmed by the opinion of the court in *Dewey v. Garvey*, 130 Mass. 86, it being there held that a State lunatic hospital, with relation to a contract, is to be taken to be "the substitute or representative of the Commonwealth itself, and the party in interest must necessarily be the Commonwealth."

The case of *Flagg v. Bradford*, 181 Mass. 315, is even more decisive, to my mind. There the action was in contract against Edward S. Bradford, as Treasurer and Receiver-General of the Commonwealth. The court holds (p. 316) that the action is in substance and effect an action against the Commonwealth, "and, although nominally against the defendant, it seems to us plain that the action is really against the Commonwealth."

I am, therefore, of opinion that in all cases where proceedings are instituted by persons appearing and acting solely as representatives or agents, with due authority, for the Commonwealth, and asserting or affirming a right or interest of the Commonwealth, no entry fee is properly chargeable in any of our courts.

APPROPRIATION — SPECIAL COMMITTEE — EXPENSES — EXPERT ADVICE.

The committee appointed by the Governor under the provisions of Res. 1903, c. 86, to investigate and report upon the legislation needed to authorize the making of public improvements under a more extensive exercise of the right of eminent domain than is now permitted by the constitution and laws of the Commonwealth, is not authorized to incur expense for expert advice, to be paid for outside the appropriation for "clerk hire, printing and postage," made by such resolve.

Your Excellency transmits to me a letter from Mr. Leslie C. Wead, under date of September 10, which I return herewith, referring to the provisions of c. 86 of the Resolves of 1903, and inquiring whether the committee, of which he is one, appointed under that resolve, has authority to employ expert advice to be paid for outside of the one-thousand-dollar allowance for clerical assistance.

To the
Governor.
1903
September 18

The resolve is as follows: —

Resolved, That the governor, with the advice and consent of the council, be authorized and requested to appoint, not later than the thirtieth day of June in the year nineteen hundred and three, a committee to consist of three or more suitable persons, one of whom he shall designate as chairman, to investigate and report upon the legislation needed to enable the general court, by special acts, subject to other provisions of the constitution, to authorize any city, town or state commission to take in fee, to purchase, or otherwise to acquire for public purposes and in connection with any given public work, all or any part of the land within certain defined limits, and after appropriating for such public work so much of the land so taken as is needed therefor to sell or lease the remainder. The committee may employ such assistance as may be necessary, shall give a hearing to all persons desiring to be heard upon the subject, and shall make a report of their doings, with such recommendations as they may deem proper, to the next general court. The committee may expend in the performance of its duties such sum for clerk hire, printing and postage, not exceeding one thousand dollars, as the governor and council may determine, to be paid out of the treasury of the Commonwealth. The powers of the committee shall terminate on the making of their report, and they shall annex to their report the draft of a bill in accordance with such recommendations, if any, as they may make.

I am of the opinion that the true construction of the resolve does not permit such employment as is contemplated by the inquiry. No expenditure by the committee can be permitted except such as is expressly authorized by the terms of the act, or arises by necessary implication therefrom, and no expenditure can be authorized by implication unless such be necessary to insure the declared purpose of the act.

I do not think that under this rule of construction the expenditure would be authorized, for I am of the opinion that the Legislature contemplated the appointment upon the committee of gentlemen who had peculiar knowledge of the conditions and issues with which they were to deal, and intended to rely upon their judgment and opinion rather than upon advice of others which, for a compensation, they might secure; and Your Excellency has appointed gentlemen of such character, experience and sagacity as to make their opinions of the highest value.

The use of the phrase "may employ such assistance as may be necessary" might possibly suggest an authority for the employment of some forms of necessary assistance; but that which is suggested by the inquiry of Mr. Wead does not appear to me to fall within the range of the assistance contemplated. I rather incline to the opinion that the phrase "may employ such assistance as may be necessary" is to be taken in connection with the later provision for clerical assistance, the expense for which is expressly limited. In other words, I think the true intent of the resolve, considering all its provisions, is that the expenditures authorized to be made are limited to the sum of one thousand dollars; and I am confirmed in this view by the use of the phrase "The committee may expend in the performance of its duties such sum for clerk hire," etc., to be paid out of the treasury of the Commonwealth.

I would add further that I think the provision that "the committee may employ such assistance as may be necessary" must be held to relate to that assistance incidental to the mere administrative detail of the work of the committee itself.

The duties of the committee are in some respects analogous to those of a court. They are charged with the duty of making an inquiry by conducting hearings; they are to form and report such opinions as their own judgment may approve or suggest, or may be developed from the hearing of testimony; and I think it quite clear that no court would seek to have its responsible judgment instructed by opinions for which it would make payment.

It may be that the committee might be aided in the prosecution of their work by reports made and opinions rendered to them by persons of peculiar knowledge of the subject under investigation; but I think that the Legislature expected that such opinions would be presented in the form of testimony of persons interested in the inquiry, and that thus the committee would have the benefit of such opinions, and the opportunity of passing upon their value before reaching their conclusions.

**CIVIL SERVICE — POLICE OFFICER OF THE CITY OF CAMBRIDGE
— PROMOTION.**

The city of Cambridge is not exempted by its charter (St. 1891, c. 364, as amended by St. 1896, c. 173, and St. 1902, c. 357) from the operation of the civil service law and rules, and promotion made thereunder in the police department of such city must be accomplished subject to the established regulations of the Civil Service Commission.

To the Civil
Service Com-
mission.
1908
October 1.

In your letter received September 8 you state that the Hon. John H. H. McNamee, mayor of Cambridge, in the course of making certain changes in the police force of that city has promoted a policeman from the grade of patrolman to that of sergeant, without notifying your Board; and you request my opinion whether promotions in the police force of Cambridge are governed by the civil service rules.

The civil service law is to be found in c. 19 of the Revised Laws, and in your rules. Section 7 of the law provides that the Civil Service Commission shall include in their rules provisions for promotions, if practicable, on a basis of ascertained merit in the examinations and seniority of service. Section 9 provides that such rules shall apply to members of the police and fire departments of cities; and by Rule VII. your Board classified the members of the police force in Class 3 (c) of Schedule B "the regular and reserve forces of, and all persons doing permanent police duty in and for and paid by, any city of the Commonwealth, except the city of Boston."

Section 19 of the law provides: —

The name and residence of every person, except laborers, appointed to, promoted or employed in a position coming within the rules governing the civil service, the designation of such position and the rejection or discharge of every such person, shall forthwith be reported to the commissioners by the officer making such appointment, promotion, rejection or discharge, or providing such employment.

Under this law your Board made the following rules: —

RULE XXXVI. Every officer having the power of appointment to any position in the first division shall, within ten days, give notice in writing to the commissioners of the name and place of residence of any person appointed and employed in such position, of the rejection of any such person during or after promotion, and of the transfer, promotion,

resignation or removal, discharge or death, of any person serving under him, with the dates thereof.

RULE XL., Cl. 3. Promotions in Class 3 of Schedule B shall, so far as practicable, be by successive grades and by competitive or non-competitive examination, as the commissioners may determine: *provided, however*, that no special, supernumerary, substitute, reserve or temporary police officer, under whatever designation (unless a permanent reserve force in any city is established by act of the legislature), shall be promoted to the regular or permanent force, or assigned to permanent duty, except after competition with all applicants for said force.

Whether promotion of the patrolman in question, by competitive or non-competitive examination, was practicable or not, was a question of fact determinable not by the mayor, but by your commission alone. But, aside from this issue, upon which it may well be contended that the Honorable Mayor has ignored the law, he was certainly, in my opinion, required to notify your commission of the promotion, however made, unless the city of Cambridge is exempt by its charter from the application of the civil service law and rules.

The provisions in the Cambridge charter (St. 1891, c. 364, as amended by St. 1896, c. 173, and St. 1902, c. 357) which may apply to the situation are the following:—

SECTION 8. He [the mayor] shall at all times have the control and direction of the police force.

SECTION 10. The mayor, after due hearing, may, with the approval of a majority of the board of aldermen, remove . . . any member of the police force.

SECTION 28. The board of aldermen shall from time to time fix the number and compensation of the members of the police force, and establish general regulations for its government.

The control of the police force to be exercised by the mayor, as contemplated by the provisions of the city charter, must be, in my opinion, confined in its application to the police force as created and existing under the limitations of the general laws. Such control must be, I think, an administrative and not a creative authority. A like construction must also, in my opinion, be put upon § 28 of the city charter above referred to. That act cannot, I think, be construed as conferring upon the board of aldermen any power, to the exclusion of the authority of your

commission, by virtue of which the appointment or qualification of an officer is to be determined. The function of the board of aldermen in this respect, as declared by the charter, is, in my opinion, also an administrative one. I find, therefore, in these provisions of the charter, above cited, nothing which is inconsistent with the application of the civil service law to the police force of Cambridge. Power to make general regulations for the government of officials is not inconsistent with the specific power given to the commission to apply their tests to the persons who are to become members of the police force, or, if practicable, to those who are to be promoted therein. In other words, the qualification of membership of the police force of the city of Cambridge is subject to the established regulation of your commission.

I therefore conclude, and have the honor to advise you, that, upon the facts stated, the Hon. John H. H. McNamee, mayor of Cambridge, has failed to comply with a distinct and obligatory requirement of law.

CO-OPERATIVE BANK — LOAN — SECURITY — SECOND MORTGAGE.

The purpose of R. L., c. 114, § 14, providing that every loan made by a co-operative savings bank shall be secured by a mortgage of real estate situated within the Commonwealth, and unencumbered by any mortgage or lien "other than such as may be held by the bank making the loan," was to secure the result that property mortgaged to a co-operative savings bank should not be subjected to any liens or mortgages other than those held by the bank itself; and such statute does not forbid a second mortgage upon property upon which the same bank holds a first mortgage, provided that such property is not thereby encumbered to an amount exceeding its real value.

To the Board
of Savings
Banks Com-
missioners.
1908
October 15.

Your letter of October 10 requires my opinion upon the legality of a transaction which you state to be as follows: "A party takes out 25 shares in a co-operative bank, pledging the same and securing a loan on mortgage of real estate for \$5,000, after which another party takes out 4 shares in the same bank, and gives a second mortgage on the same property for \$200, pledging the 4 shares for the same. Separate notes are given for the respective amounts."

The only question affecting the legality of the transaction as above described is whether the provision in R. L., c. 114, § 14,

that every loan shall be secured by a mortgage of real estate situated in the Commonwealth and unencumbered by any mortgage or lien "other than such as may be held by the bank making the loan," is to be construed as requiring that the only mortgage existing upon the real estate so designated shall be that which secures the particular loan in question, or as permitting several independent loans by the same bank to be secured by independent mortgages upon such real estate.

I am of opinion that it was the intent of the statute to permit different mortgages upon the same real estate as security for different loans, provided that the directors are satisfied that the property is not subjected to mortgages exceeding in amount its real value as ascertained by them.

In St. 1877, c. 224, § 8, it was provided that loans by co-operative savings banks should be secured by a mortgage upon real estate. By St. 1881, c. 271, § 1, this act was amended so as to require that the mortgage should be a first mortgage; and this provision was substantially re-enacted in P. S., c. 117, § 13. The provision was enacted in its present form in St. 1894, c. 342. The evident intention of these statutes was to secure the result that property mortgaged to co-operative savings banks should not be encumbered by any liens or mortgages other than those held by the bank itself.

DANVERS INSANE HOSPITAL — TRUSTEES — WATER SUPPLY — CONTRACT WITH TOWN — NEW BUILDING.

Under a contract in force between the Commonwealth and the town of Danvers, by which it is agreed that the Commonwealth may take, free of charge, water from the water supply of the town for the use of the Danvers Insane Hospital, "and of all buildings that at any time may be owned by the State on the grounds; and also for use on the grounds themselves, as now laid out, for any purpose," the Commonwealth may, without payment, take water from the town supply for use in and for a building upon land acquired subsequent to the making of such contract, but not for any independent use upon the grounds so acquired.

You desire my opinion upon the following question: under a duly authorized contract, which is in force between the town of Danvers and the Commonwealth of Massachusetts, the Commonwealth is entitled to use the town water for the Danvers

To the
Trustees of
the Danvers
Insane
Hospital.
1903
October 22.

Insane Hospital free of charge, and, at its own expense, for pipes to take water for such purpose directly from the town pipes.

It appears that the trustees are erecting a new hospital building upon land which they have recently purchased adjoining the land which the Commonwealth owned for the hospital at the time when the contract was executed. The question is, whether the Commonwealth has the right, under the above-mentioned contract, to use the town water for its new building free of charge.

The material provision of the contract is as follows: —

The town of Danvers shall . . . perpetually keep a constant and ample supply of water in the reservoir, and permit the State to take therefrom, in any manner and at any time, all the water which the State through any of its authorized agents may desire or deem proper for the use of the hospital, and of all buildings that at any time may be owned by the State on the grounds; and also for use on the grounds themselves, as now laid out, for any purposes whatever. The State may at any time, at its own expense for pipes, take water for any purposes before named directly from the pipes to be laid by the town.

The important clauses are the following: —

All the water which the State through any of its authorized agents may desire or deem proper for the use (1) of the hospital, (2) and of all buildings that at any time may be owned by the State on the grounds; (3) and also for use on the grounds themselves, as now laid out, for any purposes whatever.

If this provision did not proceed beyond cl. 1, the Commonwealth might undoubtedly take water for the use of an additional hospital building. The true intent of the words "the hospital," there being no expression to the contrary, must be the hospital as an institution, not the hospital as a specific existing building, which, at the date of the contract, is used for the hospital.

Clause 2, I think, amplifies the provision of cl. 1 so as to allow the free use of the town water in all buildings that at any time may be owned by the State on the extensive grounds, whether they are buildings used for hospital purposes or not. I do not

think the intention of cl. 2 is to restrict the meaning of cl. 1 to such hospital buildings as may be later built upon grounds limited to those owned at the time of the contract. I am of opinion that the word "grounds" must be construed to mean any and all grounds owned at any time by the State, and connected with and used for hospital purposes.

Clause 3 also amplifies the provisions so as to allow the use of the town water not only for hospital purposes, but also for any use whatever on the grounds of the hospital "as now laid out," the latter words being used to distinguish between a use upon the grounds and a use for the hospital as such, and to guard against such future laying out of the extensive grounds as might require a great, and perhaps unlimited, quantity of water for outside and non-essential purposes, or against the watering of new grounds that might be acquired. Such outside use of water being obviously in the nature of a luxury, rather than a necessity, the contract restricted such use upon the grounds to the grounds as then laid out.

My conclusion is that the Commonwealth may take, without payment, water from the town supply for use in and for the new building, but not for independent use upon the new grounds, and I so advise you; though I realize that there is opportunity for argument that the intention may have been to apply cl. 1 only to the hospital building, and that cl. 2 was intended to restrict the right of the Commonwealth to buildings later erected on the grounds then owned, and that the right of the Commonwealth could not be extended to buildings, though a part of the hospital, but erected upon land later acquired. I hold, nevertheless, that the advice I submit is based upon the sounder and more tenable ground of construction.

MILITIA — ARMORY COMMISSIONERS — ERECTION OF BOAT-HOUSE
FOR THE USE OF THE NAVAL RESERVE.

A boat-house, for the storage of boats and other equipments used by a company of the Naval Reserve, located in a city or town, is a part of the armory required to be furnished by such city or town for the use of the volunteer militia quartered therein, and may be erected under the provisions of R. L., c. 16, § 107, authorizing the Armory Commissioners to acquire land in any city or town within the limits of which two or more companies of militia are located, and to erect an armory thereon for the use of such militia.

To the State
Armory Com-
mission.
1908
November 4.

You have submitted to me the following question: "In Springfield, which has a State armory, it is desired to erect a boat-house for Company H of the Naval Brigade, which will probably cost from \$7,000 to \$8,000, and the city would like to build this under the armory act. Of course they have a State armory, and this would be practically another armory, for the use of the Naval Militia, in the summer season." You add that it seems to you that the law is broad enough to accomplish this.

Company H of the Naval Brigade of Springfield is a part of the militia of the Commonwealth, for which the law requires that adequate equipment and quarters shall be provided. R. L., c. 16, § 107, provides that the Armory Commissioners shall acquire, in each city or town in which two or more companies of militia are located, suitable land, and erect thereon an armory for the companies and militia headquarters and detachments of the militia located in said city, together with necessary rooms for drills and care of state property.

Adequate buildings for the care and equipment, including boats and other property, of the Naval Brigade, together with necessary and appropriate rooms for drills, must be furnished under the law of the Commonwealth; and if the armory in Springfield, erected or in process of erection for the military companies of the militia, is not adaptable and cannot be adapted to the needs and requirements of the Naval Brigade, then another structure for that brigade must be provided, and may be well considered to be a part of the armory contemplated by the statute.

In an opinion given in reply to a question asked by the Adjutant-General on July 14, 1902,¹ the Attorney-General held that the city of Springfield was under the duty of erecting a boat-house for the care of the boats and other paraphernalia used by the company of the Naval Reserve located in that city.

I am of opinion, therefore, that a boat-house, such as is suggested in the inquiry which you submit to me, is to be considered a part of the armory, and may properly be erected under the armory act.

CIVIL SERVICE — CHIEF CLERK OF THE BOARD OF ASSESSORS
FOR THE TOWN OF BROOKLINE.

The office of chief clerk of the board of assessors for the town of Brookline is within the operation of the civil service law and rules, and the person chosen to fill such office must be chosen thereunder, notwithstanding the fact that such person is himself a member of the board of assessors, and employs a substitute to perform the duties of such office.

I have your letter of October 6, requesting my opinion whether, upon the facts submitted, certain individuals in the service of the board of assessors for the town of Brookline are within the classification established by Civil Service Rule VII., § 2. It appears that a member of the board of assessors for the town of Brookline was elected by that board to the office of assessors' chief clerk, the salary of which was, by appropriate action of the town, fixed at \$1,500. He, in turn, employed a second individual to perform the clerical duties which the office demanded, paying him for his services the sum of \$1,200. The person actually elected to the office of chief clerk is also in receipt of a salary of \$1,500 as a member of the board of assessors.

To the Civil
Service Com-
mission.
1908
November 19.

Rule VII., § 2, Schedule A, provides that: —

Schedule A shall include clerks, copyists, recorders, bookkeepers, inspectors, agents, almoners, visitors, stenographers, typewriters, messengers, and persons rendering service similar to that of any of the above-specified positions, in the service of the Commonwealth or of any city thereof, under whatever designation, whether such service is permanent or temporary, and whether the same is paid by time for work done, by the piece, or in any other manner.

¹ *Ante*, p. 361.

I am of opinion that the office of chief clerk of the board of assessors for the town of Brookline is clearly within the operation of the civil service law and rules; and that the person chosen to fill such position must be chosen thereunder, notwithstanding the fact that he may also be a member of the board itself, for the reason that the two offices are entirely distinct, both as to duties and as to compensation.

The person actually performing the duties of chief clerk, on the other hand, must, in my opinion, be regarded as a private employee of the chief clerk, who is responsible for his conduct, and from whom he receives his compensation.

SCHOOL DISTRICT — JOINT COMMITTEE OF SCHOOL COMMITTEES
— CERTIFICATION OF SALARY OF SUPERINTENDENT OF
SCHOOLS.

In a school district organized under the provisions of R. L., c. 42, § 43, the joint committee of school committees of the several towns forming such district, which is thereby authorized to act as agent of such towns, may certify to the several town treasurers the proper proportions of the salary of the superintendent of schools, without securing the approval of any other local board or authority.

To the State
Board of
Education.
1903
December 2.

You desire to be advised whether, in case a school district is organized under the provisions of R. L., c. 42, § 43, the joint committee of school committees, which is authorized thereby to act as agent for each town in the union, may certify to the several town treasurers the salary of the superintendent of schools, without the approval of any local board.

R. L., c. 42, § 44, provides that:—

The school committees of such towns shall be a joint committee, which, for the purposes of such union, shall be the agents of each town therein. . . . They shall choose, by ballot, a superintendent of schools, determine the relative amount of service to be performed by him in each town, fix his salary, apportion the amount thereof to be paid by the several towns and certify it to each town treasurer.

I am of opinion that the joint committee of school committees is authorized to certify to the town treasurer the salary of

the superintendent without obtaining the approval of any local board. Within the scope of its authority, the joint committee becomes the agent of each town, and its acts are binding upon each town composing the union. See *Freeman v. Bourne*, 170 Mass. 289, 293. There can be no doubt, therefore, that the joint committee of school committees, established under the provisions of R. L., c. 42, § 43, may, as agent of the town, certify the proper proportion of the salary of the superintendent to the town treasurer of any town within the district without the intervention of any other local authority.

WOMEN — RIGHT TO PARTICIPATE IN CAUCUSES.

Under existing statutes, women are not entitled to participate in or to vote at the caucuses of the several political parties.

In reply to your request for the opinion of the Attorney-General as to the right of women to vote in caucuses, I have the honor to say that in my opinion women have not that right.

To the
Governor.
1908
December 7.

It is clear that women have no inherent or constitutional right to vote, either in elections or in caucuses, consequently their rights are wholly derived from statutes.

There is no statute which expressly gives to them the right to vote in caucuses. R. L., c. 11, § 13, re-enacting St. 1898, c. 548, § 14, provides:—

Every female citizen having the qualifications of a male voter required by the preceding section may have her name entered upon the list of voters for school committee, and shall have the right to vote for members of the school committee upon complying with the requirements hereinafter set forth.

The right to vote, here expressly given, is without doubt the right to vote at elections. In fact, with the exception of St. 1881, c. 191, § 1, the earlier statutes (P. S., c. 6, § 3; St. 1884, c. 298, § 4; St. 1890, c. 423, § 5; St. 1892, c. 351, § 3; St. 1893, c. 417, § 14) use the word "elections."

The right to vote in caucuses, if given at all, is given by implication. Such an implication is not inconsistent with the stat-

utes which provide regulations for the government of caucuses. R. L., c. 11, §§ 91, 92. See also §§ 67, 60, 44. Furthermore, in favor of such an implied right, it may be urged that the right to vote at elections requires, to make it effective, the right to vote in the caucuses; in other words, that the right to vote in the caucuses is an incident of the right to vote at elections.

There is, however, a statutory provision in R. L., c. 11, § 144, which tends to rebut this implication. It there appears that "women who are qualified to vote may sign nomination papers for candidates for the school committee." From this it may fairly be argued that, since the Legislature deemed it necessary to make a special provision to enable women to sign nomination papers, it would have been equally necessary to have made a special provision to enable them to vote in caucuses.

A further indication of the intention of the Legislature is to be found in the fact that the Legislature in 1901 was petitioned to enable women to participate in caucuses for school committee; that a bill was introduced amending St. 1898, c. 548, § 91, by changing the oath therein contained and by adding at the end of the section, "Women entitled to vote for school committee shall have the right to take part in any caucus, in which candidates for school committee or delegates to any convention at which candidates for school committee are to be selected, to the extent of participating in the selection of such candidates or delegates;" and that the committee reported "leave to withdraw," which report was accepted.

This action clearly indicates the opinion which the Legislature had of the St. 1898, c. 548, namely, that women had no right to vote in caucuses. It further shows that the Legislature did not intend to give such a right. As the same Legislature revised the laws, its intention is the important factor in the interpretation of R. L., c. 11.

These two considerations seem to me sufficient to rebut the implication of a right of women to vote in the caucuses.

INSURANCE — FIRE COMPANY — FOREIGN CORPORATION — CONTRACT — STANDARD POLICY.

A fire insurance company organized under the laws of another State, and not admitted to do business in this Commonwealth, may, without violating any of the provisions of R. L., c. 118, issue a policy differing in form from the standard policy of fire insurance established by such statute, if the contract of insurance is made and the policy delivered without the Commonwealth, and no person acts as agent or broker within the Commonwealth in negotiating the contract.

In your letter of October 19 you state that a fire insurance company, organized under the laws of another State, and not admitted to do business in Massachusetts, issued on property in Massachusetts a policy which differed from the standard form prescribed by the Massachusetts law. The contract was made and the policy delivered outside of Massachusetts. It does not appear that any person acted as agent or broker within Massachusetts in negotiating the contract. You ask whether these facts will support a prosecution for violation of the Massachusetts laws.

To the Insurance Commissioner.
1908
December 16.

The following sections of the insurance law (R. L., c. 118) are material: —

SECTION 60. No fire insurance company shall issue fire insurance policies on property in this commonwealth, other than those of the standard form herein set forth. . . .

SECTION 98. A person who assumes to act as an insurance agent or insurance broker without license therefor as herein provided, or who acts in any manner in the negotiation or transaction of unlawful insurance with a foreign insurance company not admitted to do business in this commonwealth, or who, as principal or agent, violates any provision of this chapter relative to the negotiation or effecting of contracts of insurance, shall be punished for each offence by a fine of not less than one hundred nor more than five hundred dollars.

SECTION 3. . . . it shall be unlawful for a company to make a contract of insurance upon or relative to any property or interests or lives in this commonwealth, or with any resident thereof, or for any person as insurance agent or insurance broker to make, negotiate, solicit or in any manner aid in the transaction of such insurance, except as authorized by the provisions of this chapter. . . .

The foreign company has not violated any of these laws, because its acts were done outside the jurisdiction. These penal laws have no extra territorial effect. See Sedgwick on Construction of Statutes, p. 64; Rorer on Interstate Law, pp. 209, 210; *Johnson v. Mutual Life Ins. Co. of New York*, 180 Mass. 407.

No agent or broker has taken part within the Commonwealth in negotiating or prosecuting the contract, therefore no conviction may be had, as in the cases of *Hooper v. California*, 155 U. S. 648; *Nutting v. Massachusetts*, 183 U. S. 553.

The owner of the property himself, while he has a right, under the Federal Constitution, to contract outside the State for insurance on his property (*Allgeyer v. Louisiana*, 165 U. S. 578), may be prohibited from contracting within the jurisdiction of Massachusetts with any foreign company which has not acquired the privilege of engaging in business therein, either in his own behalf or through an agent empowered to that end (*Hooper v. California*, 155 U. S. 648, 656); but the owner made this contract, as matter of fact, in another State. Accordingly, under the principles stated above, he has committed no offence against the laws of Massachusetts.

There is a further provision of the Massachusetts law which must be considered, viz.: the last clause of § 3, — "All contracts of insurance on property, lives or interests in this commonwealth shall be deemed to be made therein." If this statute means more than that the legality and construction of such contract shall be governed by the Massachusetts law, and attempts to take away a man's right to contract outside the State, it is unconstitutional. *Allgeyer v. Louisiana*, 165 U. S. 578.

The Legislature has no power to decide for the courts of Massachusetts that the contract of insurance in question was made in Massachusetts, when, under the law of the land, it was made in another State. If by a fiction it seeks to transfer the place of making the contract to Massachusetts, for the purpose of imposing a penalty for making it, it is a violation of the Massachusetts Declaration of Rights and of the 14th Amendment of the United States Constitution.

I am, therefore, of the opinion that, upon the facts stated, no prosecution for violation of the laws of this Commonwealth can be sustained.

TOWNS — JOINT CAUCUSES — ACCEPTANCE OF STATUTE.

In towns using official ballots, which, at the State election held on November 3, 1903, voted to accept the provisions of St. 1903, c. 454, an act providing for joint caucuses of all political parties, as required by § 18, no further action is necessary to render such statute fully operative; the provision in § 2 that caucuses as established by the statute shall be held in towns using official ballots, "which towns at an annual meeting vote that primaries shall be held therein," being applicable only to cases where for any reason the statute was not accepted at the State election specified, in which event the question of acceptance may hereafter be passed upon at an annual town meeting.

I have the honor to reply to a communication from Your Excellency requiring my opinion upon the effect of the action of certain towns which, at the last State election, voted to accept the provisions of St. 1903, c. 454, entitled, "An Act to provide for joint caucuses or primaries of all political and municipal parties."

To the
Governor.
1903
December 31.

Section 18 of the statute above cited, which contains the enacting clause, is as follows: —

This act shall take effect in Boston upon its passage. In other cities and in towns using official ballots the question of its acceptance shall be submitted to the voters at the next annual state election and the act shall take effect as soon after its acceptance by a majority of the voters voting thereon as the provisions of law relative to nominations can be complied with.

Section 2 provides that: —

All caucuses of political and municipal parties in cities, and in towns using official ballots, which towns at an annual meeting vote that primaries shall be held therein, except caucuses to elect delegates to conventions held for the election of delegates to national conventions, and for the choice of ward committees after the change of ward lines, shall be held at the same time and place as primaries, and shall be conducted in general accordance with the provisions of law concerning the conduct of elections and the manner of voting thereat, except as otherwise provided herein.

Towns voting that primaries shall be held therein may, at a legal meeting called for the purpose, not less than one year after the date of the first primary held therein, revoke such action.

Clerks of towns which vote to hold primaries or to rescind such action shall forthwith notify the secretary of the Commonwealth of such vote.

It is now suggested that the words "which towns *at an annual meeting* vote that primaries be held therein," require, upon the part of towns which at the last State election voted to accept the provisions of the statute in accordance with the terms of § 18, a further vote of acceptance at an annual town meeting before the statute may become operative therein.

The words "annual meeting" by themselves are clearly applicable only to the annual town meeting held in the several towns in either February, March or April, for the election of town officers and for the transaction of other local business (see R. L., c. 11, §§ 327, 334, etc.), and do not apply to nor include a town meeting called for the purpose of choosing State officers. There is, therefore, an apparent contradiction in terms between the provisions of § 2 and § 18 as to the time when the statute shall be accepted and shall become effective in towns in which official ballots are used, the former designating an annual town meeting held in the spring as the proper time for such acceptance, and the latter requiring a vote thereon at the State election for the current year.

I am of opinion, however, that this contradiction is rather apparent than real. It is a well-recognized rule that in the construction of statutes the legislative intent is to be ascertained from a consideration of the act as a whole; and that, if possible, inconsistencies are to be harmonized so as to give reasonable effect to each of its provisions. Applying this principle to St. 1903, c. 454, it is clear that the Legislature intended that the act should be accepted at the next annual State election after the passage of the act, to wit, the election held upon November 3, 1903, and in § 18 such intention is set forth in express terms. This being so, it is obvious that the provision in § 2, regulating the conduct of caucuses in towns which at an annual meeting have voted that primaries should be held therein, cannot be

construed to require an additional vote of acceptance by such towns; for, if so construed, it would require a double referendum in the case of towns, and the provision of § 18 would be entirely without effect. If, on the other hand, the language of § 2 be construed to supplement the provisions of § 18, by providing a further opportunity for the acceptance of the statute, if for any reason such acceptance was not accomplished at the State election for the present year, there will be no inconsistency between the sections under consideration.

I am, therefore, of opinion that in all cases where towns have accepted the provisions of St. 1903, c. 454, at the State election held on November 3 of the present year, no further action is necessary in order that the act may become fully operative in accordance with the provisions of § 18; and that, in all towns where the statute was not so accepted, such towns may, at a subsequent annual town meeting, vote upon the acceptance of the statute.

HOURS OF LABOR — EMPLOYEES OF THE COMMONWEALTH —
“OFFICE WORK.”

R. L., c. 106, § 19, providing that “nine hours shall constitute a day’s work for all laborers, workmen and mechanics who are employed by or in behalf of the commonwealth,” does not include employees whose duties are of such a character as to bring them within the term “office work,” and the hours of labor for employees so engaged may be determined by the period of service required for the proper performance of the work of the department in which they are employed.

Your inquiry is directed to the question whether or not there exists any statutory regulation which fixes the hours of labor of employees of your commission “engaged in office work.”

To the Charles
River Basin
Commission.
1904
January 27.

St. 1903, c. 229, amending R. L., c. 18, § 13, provides that:—

The offices of all the departments of the state government shall be open to the public for the transaction of business daily, except on Sundays and legal holidays, from nine o’clock in the forenoon until five o’clock in the afternoon, except on Saturdays, when they may be closed at twelve o’clock, noon. The treasurer and receiver general shall not be required to keep his office open for the receipt and payment of money later than two o’clock in the afternoon.

The word "departments," as above used, has no technical signification, and applies as well to any distinct division of the executive branch of the government as to the departments of the Secretary, Treasurer and Receiver-General, and other administrative offices of the Commonwealth. See R. L., c. 18; P. S., c. 21. There is no apparent reason, therefore, why the section above quoted should not be applicable to the Charles River Basin Commission. But the requirement that offices of the several departments of the Commonwealth shall be open for business during the hours specified is intended for the benefit of such members of the public as may be brought into business relations with such departments, and is not in any sense a regulation of the hours of labor of the employees therein. If, in the opinion of those to whose responsibility and discretion the business of such department is intrusted, the labor of the employees within the hours specified in the section above quoted is sufficient to accomplish, with due care and diligence, the business of the department, the hours of labor for employees who perform office work may well be made to coincide with the period during which, under St. 1903, c. 229, the office of the department must be kept open for business.

On the other hand, I am aware of no statutory regulation which would prevent the heads of the several departments of the Commonwealth from requiring a longer period of service from employees engaged in office work, if such additional service should be necessary for the proper performance of the work of the department.

There is in R. L., c. 106, § 19, a provision to the effect that "nine hours shall constitute a day's work for all laborers, workmen and mechanics who are employed by or in behalf of the commonwealth, or of any county, city or town therein. . . ." While this section obviously applies to all laborers, workmen and mechanics who may be employed by your commission, in my opinion it is not to be construed to extend to or include employees whose duties are of such a character as to be properly within the term "office work."

LICENSES — ENGINEERS AND FIREMEN — CITIZENSHIP AND RESIDENCE OF APPLICANT.

An applicant for a license under the provisions of R. L., c. 102, § 81, to act as engineer or fireman, is entitled to be examined, and, if found competent, to receive his license, notwithstanding the fact that he is not a citizen of this Commonwealth and that his residence therein appears to be only temporary.

R. L., c. 102, § 81, provides in part as follows: "Whoever desires to act as engineer or fireman shall apply for a license therefor to the examiner of engineers for the city or town in which he resides or is employed."

To the Deputy
Chief of the
Massachusetts
District Police.
1904
February 4.

Your communication states that under this statute a person has presented himself to one of the inspectors of police in your department for the purpose of being examined as to his qualifications as an engineer. The applicant has lived in the State since last November, and it is stated that the evident purpose of the application is to obtain a license "supposedly to be used as a recommendation for employment in some other State." Under these circumstances you desire to be informed whether, under the existing law, the inspector may examine, and, if qualified, issue to such applicant a license. You further inquire how the word "resident," as used in this statute, is to be construed.

In general, a resident of a particular locality is one whose place of abode is there, and who has no present intention of removing therefrom. So in *Lawson v. Adlard*, 46 Minn. 243, the court say: "To put it concisely, a 'resident' of a place is one who dwells in that place for some continuance of time for business or other purposes, although his domicile may be elsewhere."

In the statutes of the Commonwealth the word "resident" has been commonly identified with the word "inhabitant," and a somewhat restricted construction has been given to it, inhabitants and residents being construed to mean citizens. See *Opinion of the Justices*, 7 Mass. 523. This construction, however, is not the only one which may be given to the term, as is intimated in *Lee v. City of Boston*, 2 Gray, 484, 490, where it is said that "the words 'inhabitant' and 'resident,' 'inhabitancy' and 'residence,' are commonly, though not invariably, used in

the Constitution and laws of this Commonwealth as synonymous. There are a few passages in them where 'residents' has a somewhat broader significance than 'inhabitants,' and designates a class of persons who have no domicile within the State. Thus, where the Constitution confers authority upon the General Court to impose and levy assessments, rates and taxes upon all 'the inhabitants of and persons resident and estates lying within the Commonwealth,' it is apparent that the phrase 'persons resident' includes individuals who have no permanent home here, and are not strictly inhabitants of the State."

In the present instance I am of opinion that the word "resides" is used with a more general signification than that of citizenship, and that the statute does not restrict application for licenses thereunder to citizens of the Commonwealth. The obvious purpose of the act is to secure the safety of the public by requiring persons assuming to take charge of steam boilers and engines to demonstrate their fitness for such work, and has no necessary reference to the question of their domicile or citizenship. I cannot believe that the statute intended to distinguish between citizens and persons temporarily resident in the Commonwealth, and to exclude all persons except citizens from the business of operating steam boilers or engines; and, in my judgment, the word "resides," as used in R. L., c. 102, § 81, is to be construed in connection with the word "employed," and is of effect only to designate and establish the particular examiner to whom the applicant shall present himself.

In the particular case before me, therefore, I am of opinion that the applicant is entitled to be examined and to receive a license, provided he successfully passes the required examination.

COMMONWEALTH'S LAND — CONVEYANCE — BOARD OF HARBOR
AND LAND COMMISSIONERS.

The Board of Harbor and Land Commissioners, under the provisions of R. L., c. 96, § 3, has no general authority to convey land belonging to the Commonwealth.

You inquire whether, under the provisions of R. L., c. 96, § 3, your Board is authorized to sell and convey to the Old Colony Street Railway Company certain land on Mount Hope Bay in the city of Fall River.

To the Board
of Harbor and
Land Commis-
sioners.
1904
March 23.

R. L., c. 96, § 3, is as follows: —

Said board shall, except as otherwise provided, have charge of the lands, rights in lands, flats, shores and rights in tide waters belonging to the commonwealth, and shall, as far as practicable, ascertain the location, extent and description of such lands; investigate the title of the commonwealth thereto; ascertain what parts thereof have been granted by the commonwealth; the conditions, if any, on which such grants were made, and whether said conditions have been complied with; what portions have been encroached or trespassed on, and the rights and remedies of the commonwealth relative thereto; prevent further encroachments and trespasses; ascertain what portions of such lands may be leased, sold or improved with benefit to the commonwealth and without injury to navigation or to the rights of riparian owners; and may lease the same for periods not exceeding five years. It may make contracts for the improvement, filling, sale, use or other disposition of the lands at and near South Boston known as the Commonwealth Flats, may lease any portion thereof with or without improvements thereon, for such periods and upon such terms as it shall deem best, may regulate the taking of material from the harbor and fix the lines thereon for filling said lands, and shall cause a general plan of said lands to be prepared, whereon it shall designate the portions which in its opinion should be devoted to railway and commercial purposes and those which should be devoted to general purposes. All conveyances, contracts and leases made under the provisions of this section shall be subject to the approval of the governor and council.

The Board of Harbor and Land Commissioners was created by St. 1879, c. 263, with all the powers of the previously existing and separate boards of Harbor Commissioners and Land Commissioners. Undoubtedly, at the time when this statute was passed the Board of Land Commissioners had authority to con-

vey land of the Commonwealth, subject, in general, to the approval of the Governor and Council. See Gen. St. c. 5, § 15; Res. 1859, cc. 52, 103; Gen. St. c. 15, § 23.

In the revision of 1882, however, embodied in P. S., c. 19, § 3, the authority to sell land belonging to the Commonwealth was omitted from the section defining the powers of the Board of Harbor and Land Commissioners; and, as it now exists in R. L., c. 96, § 3, which is a practical re-enactment of P. S., c. 19, § 3, no such authority is conferred, except in the case of lands at or near South Boston, known as the Commonwealth flats. In view of the fact that this authority to sell disappears in 1882 and was not re-enacted in the Revised Laws, which now govern the action of the Board, it is interesting to observe that, in the case of the lands above referred to, such authority is specifically given; and the use of the word "sale" in that connection, in my opinion, is of weight, to show that it was intentionally omitted in the earlier provisions of R. L., c. 96, § 3.

In spite of the able and exhaustive brief of counsel for the petitioner for the execution of such sale, therefore, I am of opinion that the Board of Harbor and Land Commissioners is not authorized to convey to the Old Colony Street Railway Company land situated in or near the city of Fall River; and that, if such a sale is desirable, competent authority must be secured to effect it.

INSURANCE — BURIAL ASSOCIATION — FOREIGN CORPORATION.

A so-called "burial association," which assesses its members, and, upon the death of a member, furnishes the services of an undertaker and the supplies incidental to a funeral to the value of \$100, is an insurance company, within the meaning of R. L., c. 118, § 65, and is subject to the provisions of the insurance laws.

Such an association, incorporated under the laws of a foreign State, would not be permitted to enter the Commonwealth under the provisions of R. L., c. 126, § 2, relating to foreign corporations, for the purpose of doing the business for which it was incorporated.

I have the honor to reply to your inquiries submitted to me in the following form of question:—

"1. Is a burial association an insurance corporation within the

To the Com-
mittee on
Insurance.
1904
April 1.

meaning of the laws of this State, and subject to our laws relating to insurance corporations?"

You state that the burial association referred to in your inquiry is conducted as follows: "It has a president, secretary, treasurer and board of directors. Members are elected by the directors. The conditions of membership are that each member shall pay a certain sum as an entry fee, and that he shall also pay any assessment. Assessments are limited to 12 cents, assessable upon the death of an adult member, and 7 cents, assessable upon the death of a child member. If there is sufficient money in the treasury to pay burial expenses upon the death of a member, there is no assessment. Upon the death of a member no sum of money is paid to his family or representatives; but the contract of membership provides that an undertaker, employed by the association, shall furnish all that is required for the burial, at a cost estimated to be \$100 in the case of an adult and \$50 in the case of a child. There is no limit to the number of members, other than as stated above. Each member must be a resident of the State, and membership may be limited to residents of a particular city or town."

Section 65 of c. 118 of the Revised Laws provides that "all corporations, associations, partnerships or individuals doing business in this Commonwealth under any charter, compact, agreement or statute of this or any other state, involving the payment of money or other thing of value to families or representatives of policy and certificate holders or members, conditioned upon the continuance or cessation of human life, . . . shall be deemed to be life insurance companies, and shall be subject to the provisions of the insurance laws."

The association whose case is presented by your statement assesses its members, and upon the death of a member furnishes the services of an undertaker and the supplies incidental to a funeral to the value of \$100. It is, therefore, in my opinion, an insurance company. Such an association, incorporated in another State, upon complying with the laws relating to foreign corporations, would not be entitled to do business here.

You further inquire whether the United States Burial League,

a copy of whose contract you have forwarded to me, and which is herewith returned, would be allowed to enter the Commonwealth under the laws relating to foreign corporations, and do the business for which they have been incorporated in the State of New Jersey. This inquiry I must answer in the negative.

REGISTERED PHARMACIST — SUSPENSION OF LICENSE OR CERTIFICATE OF REGISTRATION — CONVICTION.

The Board of Registration in Pharmacy, under R. L., c. 76, § 17, which provides in part that "the license or certificate of registration of a registered pharmacist shall not be suspended for a cause punishable by law until after his conviction by a court of competent jurisdiction," may suspend the certificate of registration or license of a registered pharmacist who has been duly found guilty of the illegal sale of intoxicating liquors and sentenced to pay a fine therefor, and who has paid such fine, notwithstanding the fact that exceptions thereto have been filed and allowed, and are still pending for argument before the Supreme Judicial Court.

To the Board
of Registration
in Pharmacy.
1904
April 22.

The Board of Registration in Pharmacy requests the opinion of the Attorney-General upon the following state of facts: a pharmacist was found guilty of illegal selling of intoxicating liquors, and sentenced to pay a fine thereon. He paid this fine and filed exceptions, which were allowed, and are still pending in the Supreme Judicial Court awaiting argument; the specific question submitted being, is there, upon such state of facts, a conviction within the meaning of R. L., c. 76, § 17, which is as follows: —

If the full board sitting at such hearing finds the person guilty, the board may suspend the effect of the certificate of his registration as a pharmacist for such term as the board fixes, but the license or certificate of registration of a registered pharmacist shall not be suspended for a cause punishable by law until after his conviction by a court of competent jurisdiction.

I am of opinion that there is, upon the facts presented, such a conviction as is contemplated by the statute authorizing the Board of Registration in Pharmacy to suspend a license or certificate of registration of such pharmacist. The word "conviction" is used in our statutes in two different senses, and in the statute above quoted it is to be taken in its more usual sense;

that is, as meaning "the confession of the accused in open court, or verdict returned against him by the jury which ascertains and publishes the fact of his guilt," and does not necessarily contemplate a sentence of the court.

It has been held that the intention of the statute is to give a pharmacist charged with a crime the right to a trial in the court having jurisdiction of his offence; but if his guilt be there established, so that the court may impose sentence according to its powers, then it is sufficiently established for the Board of Pharmacy to act upon their finding, and to impose the penalty according to their powers.

Upon the facts submitted to me, it would seem that the guilt of the defendant was so far established as to empower the court to impose a sentence; and, indeed, it appears that the court, in the exercise of that power, had imposed sentence, and rightly so, notwithstanding the exceptions taken, under the provisions of R. L., c. 220, § 3.

A like rule of construction of the word "conviction" is disclosed in the opinion of the court in *Commonwealth v. Lockwood*, 109 Mass. 323, where it was held that the Governor, with the advice of the Council, might grant a pardon of an offence after verdict of guilty, and before sentence, and while exceptions allowed by the judge were pending in the Supreme Court for argument. This decision was made having regard to the provision of the Constitution, which refers to the pardoning power in the following language: "The power of pardoning offences, except such as persons may be convicted of before the senate by an impeachment of the house, shall be in the governor, by and with the advice of council; but no charter of pardon, granted by the governor, with advice of the council before conviction, shall avail the party pleading the same . . .," from which it appears that a conviction upon which alone the power to pardon must rest may exist before sentence of the court is imposed.

I am therefore of opinion that upon the facts stated your Board may hold that a conviction, within the meaning of R. L., c. 76, § 17, appears, upon which a suspension of the license or certificate of the party so convicted may be made.

CO-OPERATIVE BANK — CONSOLIDATION — RIGHTS OF MINORITY — CONSTITUTIONAL LAW.

The Legislature has no power to compel the minority members in an existing co-operative bank, which is not a stock corporation, to surrender their interest in such bank in exchange for an interest in a consolidated bank, as prescribed in House Bill No. 1181; but, if enacted, the provisions of such bill will govern the rights of all members of co-operative banks organized after its passage, and will serve to authorize the consolidation of existing co-operative banks, if such consolidation is assented to by all the members.

To the Committee on Bill
in the Third
Reading.
1904
April 22.

Your committee desires my opinion on the constitutionality of House Bill No. 1181, which authorizes the consolidation of two or more co-operative banks doing business in the same city or town.

The bill provides for the consolidation of such co-operative banks in the following manner: If two-thirds of the members of each bank in writing approve of the consolidation, and if two-thirds of the members present and voting, at a special meeting duly called, vote in favor of consolidation, and if the Board of Savings Bank Commissioners approve, an order may be passed by the Board, requiring the consolidation. Such order shall provide that the assets of the merged bank be turned over to the continuing bank, and that the latter assume all liabilities accrued on the former's outstanding shares. As to the rights of the shareholders in the merged bank, it provides: "No more shares shall be sold by or in behalf of a bank or banks so taken over, and for every share of such bank or banks there shall be issued to the holder thereof a share of the continuing bank of the series of the nearest and lower value, and the difference in the values of the old share and the new share so issued shall be paid forthwith to the said owner in cash; provided that such a new share, issued to take the place of a pledged share of the terminating bank, shall be issued as a share pledged under the original loan, and the said difference in value shall either be paid in cash to the owner of the pledged share or be credited on his original loan at the election of the continuing bank."

The effect of a consolidation upon the interests of a dissenting member should be carefully noted. When he took a share of

stock in the A co-operative bank, he thereby agreed to pay to that bank \$1 per month until there should stand to his credit from his payments and the profits derived from the use of his money the sum of \$200, or until the share should be withdrawn or forfeited. He might withdraw at any time before pledging his share, and receive, under certain restrictions, the money standing to his credit. If he should fall in arrears upon his monthly payments, and so continue more than six months, his share, at the option of the directors, might be forfeited, and he be paid the value of his share, less a small fine for being in arrears.

Should this bill become law, according to its terms a two-thirds majority of the members of the A bank, acting with two-thirds of the members of the B bank, could compel a dissenting member in the former bank to make his monthly payments to the latter bank, or else withdraw his share. The by-laws and rules of the B bank would govern him, instead of those of the bank of which he originally became a member. If he takes a share in the B bank, the share given him is of the series having a value next below that of the series in the A bank, to which his old share belonged. The difference in value between the exchanged share and the new one, arising from the fact that the member had paid in more on the share in the A bank than the share in the B bank, being of a later series, credits him with, is given to him in cash, or, if he is a borrowing member, may be credited to him on his loan. Then, if he does not keep up his payments on the new share, he ceases to be a member; and if he is a borrowing member, his security will be foreclosed.

It is apparent that the situation is different from that presented by a consolidation of ordinary public-service corporations having fully paid shares, wherein there is a provision for buying, at their properly determined value, the shares of dissenting stockholders. In such a case the shares of the minority are taken from them, under legislative authority, upon payment of just compensation. Here no provision is made for taking their interest in the A bank at a properly appraised value paid by the B bank. The members are transferred, with their executory

obligations, from one to the other. We have, therefore, no need to consider the power of the Legislature, in view of the public good to be derived from a merger of two banks, to require the property of the minority to be taken and paid for. See *Black v. Delaware & Raritan Canal Co.*, 24 N. J. Eq. 455.

The question is, whether the Legislature may, with the approval of two-thirds of the members of each corporation, compel a dissenting member to enter into a new contract with a different corporation.

At the beginning of the discussion certain uncontrovertible propositions may be stated.

It is not within the power of a co-operative bank, organized under the general laws, to consolidate with another without the consent of the Legislature. *N. Y., etc., Canal Co. v. Fulton Bank*, 7 Wend. 412; Noyes, *Intercorporate Relations*, §§ 17, 18.

It is within the power of a co-operative bank created by special charter to consolidate with another only when its charter permits it. Since the present bill applies to all co-operative banks, in considering its validity we need not investigate the charters of such co-operative banks as were created by special acts.

The power to merge with another similar institution is not one of the implied powers in furtherance of the objects of a co-operative bank. When a person enters one bank as a member of the association, he agrees to be bound by such acts as the majority may decide as advisable within the scope of the corporate purposes. He does not agree that the corporation may transfer all its liabilities and assets, including its contract with him, to another corporation. *Clearwater v. Meredith*, 1 Wall. 25; *McCray v. Junction R.R. Co.*, 9 Ind. 358; *Botts v. Simpsonville, etc., Turnpike Co.*, 88 Ky. 54; *Oldtown & Lincoln R.R. Co. v. Veazie*, 39 Me. 580.

So far as the right of the State to object to such departure from the corporate purposes goes, that may be waived by the Legislature in passing an act authorizing consolidation upon unanimous vote of the members of both banks. The Legislature, however, has no power to waive for an individual shareholder

his right to object that the corporation is transgressing the limits of its powers. When he invested his money in the co-operative bank he authorized the majority to act for him within the scope of its chartered powers. The transfer of his contractual right to another co-operative bank he did not authorize.

The discharge of one contracting party and the substitution of a new one are a serious impairment of the obligation of his contract. See *Hamilton Mutual Insurance Company v. Hobart*, 2 Gray, 543.

It being established that the consolidation is a vital departure from the purposes for which the constituent banks were organized, the important question is as to the effect of R. L., c. 109, § 3: "Every act of incorporation passed since the eleventh day of March in the year eighteen hundred and thirty-one shall be subject to amendment, alteration or repeal by the general court. All corporations which are organized under general laws shall be subject to such laws as may be hereafter passed affecting or altering their corporate rights or duties or dissolving them."

Did the existence of this act at the time of the creation of the constituent co-operative banks have the effect of making their members agree in advance to whatever changes of purpose the Legislature might authorize, no matter how radical?

The doctrine of certain cases is that by virtue of this reserved power the dissenting shareholder in a stock corporation may be bound by a change the effect of which would otherwise be to release him. See *Durfee v. Old Colony, etc., R.R. Co.*, 5 Allen, 230; *Buffalo and New York City R.R. Co. v. Dudley*, 14 N. Y. 336. But I believe this view to be erroneous. Such power was reserved by the Legislature on account of the decision in the Dartmouth College case, that a charter is a contract within the meaning of the constitutional provision that no State shall pass a law impairing the obligation of a contract. This decision was supposed to deprive the States of that power of control over corporations which the public welfare demanded.

Accordingly, nearly all the States passed laws reserving the power of amending or repealing charters; but this power was never reserved for the purpose of enabling a corporation to alter

in a radical manner the contract between its shareholders, or for the purpose of enabling the corporation to impair a contract between itself and its members; it was solely to avoid the effect of the decision that the charter itself was a contract between the State and the corporation. The Legislature under this power may impose new duties and new restraints upon corporations in the prosecution of enterprises already undertaken, whether they should be assented to or not; but the Legislature cannot impose upon the minority of a corporation the duty of embarking in a new enterprise, or of substituting their contracts with one corporation for similar contracts with another. All the Legislature may do is to grant the power, and then it is for the corporation to accept it or not, as it pleases. The right, therefore, to bind dissenting stockholders derives no additional support from the fact that the power of amending the charter had been reserved by the Legislature, but depends essentially upon the question whether the change is of such a character that it may be deemed so far in furtherance of the original undertaking and incident to it as to be fairly within the power of the corporation to bind its individual members by its corporate assent, or whether it is such a departure from the original purpose that no member should be deemed to have authorized the corporation to assent to it for him. See *Kenosha, etc., R.R. Co. v. Marsh*, 17 Wis. 13; *Dow v. Northern R.R.*, 67 N. H. 1; *Mills v. Central R.R. Co.*, 41 N. J. Eq. 1; *N. H. & Derby R.R. Co. v. Chapman*, 38 Ct. 56, 71; *Zabriskie v. Hackensack, etc., R.R. Co.*, 18 N. J. Eq. 178. In the last case the court said: "The object and purpose of these provisions are so plain and so plainly expressed in the words that it seems strange that any doubt could be raised concerning it. It was a reservation to the State for the benefit of the public, to be exercised by the State only. The State was making what had been decided to be a contract, and it reserved the power of change by altering, modifying or repealing the contract. Neither the words, nor the circumstances, nor apparent objects for which this provision was made, can, by any fair construction, extend it to giving a power to one part of the corporators as against the other, which they did not have before."

I should advise that this latter view is the correct one, and that the reserved power gives the Legislature merely the right to amend the charters of corporations as between corporation and State, not as between the majority and minority within the corporation, without hesitation, except for the fact of two Massachusetts decisions. *Durfee v. Old Colony, etc., R.R. Co.*, 5 Allen, 230; *Hale v. Cheshire R.R.*, 161 Mass. 443. The reasoning of the Massachusetts court in the former case is based upon the assumption that the reservation by the State of the power to alter, amend or repeal the charter of a corporation is intended not merely for the protection of the public, but also to enable the Legislature to authorize a corporation to engage in new enterprises solely for its own benefit, and whether any interests of the public are concerned or not. If the reasoning is sound, then the Legislature might authorize a majority of the stockholders of a manufacturing company to engage in banking, insurance or railroading, against the dissent of the minority. Under this doctrine, the money invested by a stockholder in a corporation, and his contract with it, are at the mercy of the Legislature and a majority of the stockholders. I quote from the language of the court, Bigelow, C.J., page 243 *et seq.* : "When, therefore, it is expressly provided between the Legislature on the one hand and the corporation on the other, as a part of the original contract of incorporation, that the former may change or modify or abrogate it or any portion of it, it cannot be said that any contract is broken or infringed when the power thus reserved is exercised with the consent of the artificial body of whose original creation and existence such reservation formed an essential part. The stockholder cannot say that he became a member of the corporation on the faith of an agreement made by the Legislature with the corporation, that the original act of incorporation should undergo no change except with his assent. Such a position might be asserted with more plausibility, if there was an absence of a clause in the original act of incorporation providing for an alteration in its terms. In such a case it might perhaps be maintained that there was a strong implication that the charter should remain inviolate, and that

the holders of shares invested their property in the corporation relying upon a contract entered into between it and the Legislature that the provisions of the act creating it should remain unchanged. But it is difficult to see how such a construction can be put on a contract which contains an express stipulation that it shall be subject to amendment and alteration. If it be asked by whom such amendment or alteration is to be made, the answer is obvious: by the parties to the contract, the Legislature on the one hand and the corporation on the other; the former expressing its intention by means of a legislative act, and the latter assenting thereto by a vote of the majority of the stockholders, according to the provisions of its charter. It is nothing more than the ordinary case of a stipulation that one of the parties to a contract may vary its terms with the assent of the other contracting party. In such case, all persons claiming derivative rights or interests under the original contract, with notice of its terms, would be bound by the amendment or alteration to which the parties should agree. . . . It is a mistake, therefore, to say that the contract of a stockholder with a corporation established under our statutes binds the latter to undertake no new enterprise and engage in no business or operation other than that contemplated by the original charter. This interpretation puts aside the express provision authorizing an amendment or alteration of the act of incorporation, and gives it no effect against a stockholder without his assent, although he bought his stock or subscribed for his shares subject to the legal effect of such a stipulation. The infirmity of the argument in behalf of the plaintiff is, that it admits that an amendment may be legal and valid as to the corporation, if they assent to it by a vote of the majority, while at the same time it sets it aside as against the stockholder who refuses to sanction it, on the ground that as to him it is illegal and void. But we cannot see how the amendment can be said to be legal and illegal *uno et eodem flatu*. If it is valid as to the corporation, for the reason that they have accepted and approved it according to the provisions of their charter, it would seem that it must also be binding on the stockholder, who has agreed that his

rights and interests in the corporation shall be regulated and controlled by a vote of a majority, acting in conformity to the original constitution of the corporation, and within the scope of its corporate powers. The real contract into which the stockholder enters with the corporation is, that he agrees to become a member of an artificial body, which is created and has its existence by virtue of a contract with the Legislature, which may be amended or changed with the consent of the company, ascertained and declared in the mode pointed out by law. Having, by virtue of the relation which subsists between himself and the corporation as a holder of shares, assented to the terms of the original act of incorporation, he cannot be heard to say that he will not be bound by a vote of the majority of the stockholders accepting an amendment or alterations of the charter made in pursuance of an express authority reserved to the Legislature, and which by such acceptance has become binding on the corporation."

This reasoning is unsound, because it leaves out of sight the contract made by the shareholders of a corporation with each other, which is the basis of incorporation, and considers the charter only as a contract with the State. The decision, however, is not necessarily inconsistent with the true view. The new enterprise which a dissenting stockholder sought to enjoin was an extension of the railroad from Fall River to Newport, by building as far as the State line and taking a lease of the Rhode Island railroad. This was fairly within the purposes of the Old Colony charter, and gave no cause of complaint to a stockholder. It was a slight enlargement of the corporate purposes, not a deviation from them. The State waived the right which it possesses over public-service corporations to object to the enlargement of the corporate purpose. The court, indeed, observed this distinction between that case and one like the present, saying, at page 246: "It was urged, as a grave objection against the doctrine above stated, that it puts the minority of the stockholders of a corporation entirely within the control of the Legislature and a majority of the stockholders, and that there would be no limit or restraint placed on the exercise of the power, so

that corporations might be diverted to purposes and objects wholly foreign to those for which they were originally established, and stockholders might be made to participate against their will in undertakings which they never contemplated and which they deemed inexpedient or ruinous. . . . No such question arises in the present case, inasmuch as the additional acts, the validity of which is called into controversy by the plaintiff, do not empower the defendants to engage in any undertaking essentially different in kind from that which was embraced in the original acts by which their corporate existence under their present name was authorized and established."

And again, on page 241, the court calls attention to another distinction which exists between that case and the present: "Nor are we called on to determine the effect which such a legislative act would have upon a previously existing executory contract entered into with the corporation; as, for instance, an agreement to subscribe for stock and to become a member of a corporate body, created or to be established for certain distinct and designated objects. No such question arises in the present case. The plaintiff had no executory agreement with the defendants at the time the act in question was passed by the Legislature, or when it was approved and accepted by a legal vote of the corporation."

In *Hale v. Cheshire Railroad*, 161 Mass. 443, it was held that a minority stockholder in the Cheshire railroad, which, without his objection, had consolidated with the Fitchburg railroad by authority of the Legislature, was bound by the terms of the consolidation, and could not have an accounting of his share of the assets of the Cheshire railroad as upon a dissolution. The court said: "Dissenting stockholders are bound by the vote of the majority, acting in good faith and within legislative sanction. It was within the constitutional power of the Legislature to authorize the consolidation. If the plaintiffs had any ground for complaint as to the terms of the plan of consolidation, they should have tried to prevent its going into effect. They virtually concede, however, that the Legislature might sanction a consolidation which should go into effect against their protest. Since the consolidation has gone into effect, they cannot now maintain a claim for better terms to themselves than have been voted."

There is no further discussion of the broad question involved, and, indeed, no point was raised in argument except how much the plaintiff was entitled to receive for his stock. Manifestly, the court could not make a different contract as to that from the one which the corporation, of which he was a member, had made when he conceded that the corporation had a right to make it.

I, therefore, conclude that the Legislature has no power to compel the minority in an existing co-operative bank, which is not a stock corporation, to give up their interest in it for an interest in a consolidated bank in the manner prescribed by this bill. This is not saying, however, that the bill as it stands is unconstitutional. If enacted, it certainly will govern the rights of all members of co-operative banks organized after its passage. Even as to existing banks, it authorizes their consolidation; and, if all the members assent, a consolidation under it will be binding upon all. See *Nugent v. Supervisors*, 19 Wall. 241, 249; *Dickinson v. Consolidated Traction Co.*, 114 Fed. 232, 252.

TAXATION — FOREIGN EXPRESS COMPANY — INTERSTATE COMMERCE.

St. 1903, c. 437, § 75, imposing an excise tax upon foreign corporations admitted to transact business within this Commonwealth under the provisions of § 58 of such statute, is not applicable to an express company organized under the laws of a foreign State, and receiving no goods in Massachusetts for delivery within the Commonwealth, the business transacted by such company being interstate commerce, and as such exempt under the Constitution of the United States, Article I, § 8, from State regulation and control.

In your letter of February 4 you desire my opinion upon the question whether an express company organized under the laws of a foreign State, and receiving no goods in Massachusetts for delivery at other points within the Commonwealth, is liable to a tax under St. 1903, c. 437, § 75.

To the Com-
missioner of
Corporations.
1904
April 25.

The business of such company is interstate commerce, and is exempt under the federal Constitution from State regulation and control. The State may not attach conditions to the right of transacting it beyond local regulations made in the proper exercise of the police power. It may not enjoin the corporation from

the transaction of its business. See *Western Union Telegraph Company v. Massachusetts*, 125 U. S. 530, 554; *Crutcher v. Kentucky*, 141 U. S. 47; *Opinion of the Attorney-General*, June 5, 1903.

The corporation is liable, however, to be taxed upon all its property, both tangible and intangible, within the jurisdiction of the Commonwealth, in return for the protection which its property receives under our laws. While indirectly affecting interstate commerce, taxation is not considered as a burden on its free exercise. *Pittsburgh, etc., Railway Company v. Backus*, 154 U. S. 421; *Adams Express Company v. Ohio*, 165 U. S. 194; *Western Union Telegraph Company v. Texas*, 105 U. S. 460.

The franchise of a corporation is property, and, not being derived from the United States, is subject to taxation either directly or indirectly. *Atlantic & Pacific Telegraph Company v. Philadelphia*, 190 U. S. 160, 163, and citations. In assessing a tax upon such corporation the State is not restricted to the property physically located within its limits, but, since the value of this property is enhanced by the manner of its use in connection with the system of the company's business throughout the country, it may tax the corporation upon a proportion of its total value, including all its franchises, if such proportion is based upon the property within the State. *Adams Express Company v. Ohio*, 165 U. S. 194; *Adams Express Company v. Ohio* (on petition for re-hearing), 166 U. S. 185; *Adams Express Company v. Kentucky*, 166 U. S. 171.

Further, the court has held that the form of the tax is not essential. It may be framed as an excise tax upon the privilege of doing business within the State, provided the exaction be not susceptible of exceeding the sum which might be levied directly on its property, and that payment be not made a condition precedent to the right to carry on the business, but that the enforcement of the tax be left to the ordinary means devised for the collection of taxes. The ascertainment of the amount, whatever the tax be called, must be made dependent in fact on the value of the corporation's property situated within the State. *Postal Telegraph Cable Company v. Adams*, 155 U. S. 688; *Maine v.*

Grand Trunk Railway Company, 142 U. S. 217; *New York v. Roberts*, 171 U. S. 658.

The tax in question is imposed in the following terms:—

SECTION 75. Every foreign corporation of the classes described in section fifty-eight shall, in each year, at the time of filing its annual certificate of condition, pay to the treasurer and receiver general, for the use of the commonwealth, an excise tax to be assessed by the tax commissioner of one hundredth of one per cent. of the par value of its authorized capital stock as stated in its annual certificate of condition; but it may deduct from such tax the amount of taxes upon property paid by it to any city or town in the commonwealth during the preceding year, and the amount of such excise tax shall not in any one year exceed the sum of two thousand dollars.

This tax is not founded in any way upon the property of the company situated in Massachusetts. It can only be regarded as an excise tax, based upon the fact of doing business in the Commonwealth. *Pratt v. Street Commissioners of Boston*, 139 Mass. 559, 562. Like the tax held invalid in *Leloup v. Mobile*, 127 U. S. 640, which overruled *Osborne v. Mobile*, 16 Wall. 479, it affects all the property of the corporation, wherever situated. While it is far smaller in amount than a valid property tax might be, yet the mode of assessment cannot be sustained if we apply it to this corporation. The Legislature might make the tax any percentage of the capital stock it desired, and in case of ordinary foreign corporations such tax would be valid, subject only to the requirement of the Massachusetts Constitution that it be a reasonable excise. But in taxing a corporation which is engaged wholly in the business of interstate and foreign commerce, the amount of tax must be based upon the company's property subject to the jurisdiction of this Commonwealth.

I therefore advise that the tax imposed by § 75 does not apply to the company in question.

CORPORATION — ORGANIZATION BEYOND THE LIMITS OF THE COMMONWEALTH.

Persons associating together under the provisions of St. 1903, c. 437, §§ 9, 10, to form a business corporation, may not legally hold the meeting at which the organization of such corporation is to be effected beyond the jurisdiction of the Commonwealth.

To the Com-
missioner of
Corporations.
1904
April 28.

In answer to your inquiry as to whether or not "the associates who form a corporation under the provisions of c. 437 of the Acts of 1903, §§ 9 and 10, may hold the meeting for organization outside the Commonwealth," I have to advise you that in my opinion such meeting may not be held beyond the limits of the Commonwealth.

The statute above referred to contains, it is true, no express provision with regard to the place where such first meeting shall be held; but the doctrine that a corporation can have no legal existence beyond the limits of the sovereignty by which it is created is well established. See *Bank of Augusta v. Earle*, 13 Peters, 519. The precise issue presented by your inquiry has been passed upon in many jurisdictions, with the uniform result that an organization effected beyond the jurisdiction of the State by virtue of whose law the incorporation is authorized has been held to be void and without effect. *Miller v. Ewer*, 27 Maine, 509; *Smith v. Silver Valley Mining Co.*, 64 Maryland, 85; *Camp v. Bryne*, 41 Missouri, 525; and see 1 *Op. Atty.-Gen.*, 185.

This conclusion is strengthened by the provisions of St. 1903, c. 437, § 18, that the clerk of a corporation organized thereunder shall be a resident of the Commonwealth; and in § 20, that all meetings of the stockholders shall be held within its limits.

These provisions, although not in themselves decisive of the question submitted, in my judgment tend to show that the Legislature did not contemplate that any of the meetings of a Massachusetts corporation should be held beyond the jurisdiction of the Commonwealth.

CONSTITUTIONAL LAW — HOURS OF LABOR ON PUBLIC WORKS.

- It would seem, in view of the decision of the Supreme Court of the United States in *Atkin v. Kansas*, 191 U. S. 207, that a proposed bill regulating the hours of labor of workmen employed by the Commonwealth, by the several counties and by certain cities and towns, or by persons contracting with the Commonwealth, the counties and such cities and towns, would not, if enacted, be open to objection upon constitutional grounds.

I have the honor to acknowledge the receipt of an order of the honorable House of Representatives, passed on the second day of May, 1904, which is of the tenor following: "*Ordered*, that the Attorney-General be requested to furnish to the House of Representatives his opinion as to the constitutionality of the provisions of House Bill No. 1320, which regulates the hours of labor of workmen employed by the Commonwealth, or by any county, or by certain cities and towns, or by persons contracting with the Commonwealth or with any county or with certain cities and towns," with which order the bill referred to was transmitted to me. The act referred to is substantially the same in its provisions as that which received my consideration in an opinion under date of June 15, 1903, and the attention of my predecessor, Attorney-General Knowlton, in his opinion of April 24, 1901.¹

To the House
of Representa-
tives.
1904
May 6.

I have the honor to advise the House of Representatives that in my opinion the bill is constitutional, so far as it applies to the Commonwealth. So far as it applies to municipalities and counties within the Commonwealth, the reasons for holding it to be unconstitutional, as in effect taking property without compensation and without due process of law, and as authorizing the appropriation of taxpayers' money for private purposes, have been already set forth in the opinions above referred to.

Since the last opinion of the Attorney-General above cited, a majority of the Supreme Court of the United States, in an opinion written by Mr. Justice Harlan, have decided that an act of the State of Kansas, similar in its provisions to the act now submitted to me, did not conflict with the fourteenth amendment of the federal Constitution. The Chief Justice and Justices Brewer and Peckham dissented from the opinion of the court above cited.

¹ *Ante*, p. 264.

Though the opinion is by a divided court, and though the adjudication of the majority is not necessarily or conclusively binding upon the courts of the Commonwealth, since the decision of that majority was in favor of the constitutionality of the Kansas act, it is, nevertheless, manifest that the decision itself must be of commanding if not controlling influence upon other tribunals. I should, therefore, deem it presumptuous and perhaps an exhibition of undue hardihood if I assumed to reaffirm my former opinion, which is approved by a minority of the justices of the United States Supreme Court.

It is to be noted that, since the decision of the Supreme Court of the United States in the Kansas case (*Atkin v. Kansas*, 191 U. S. 207), an elaborate and most carefully considered decision has been made by the Court of Appeals of New York in *Ryan v. the City of New York*, 177 N. Y. 271. The majority of that court hold to the view of the majority of the Supreme Court of the United States in the Kansas case. O'Brien, Bartlett and Vann, JJ., however, dissent, in a long opinion based upon the same reasons which have influenced the Attorneys-General of Massachusetts in their opinions upon the unconstitutionality of the legislation embodied in the act now referred to me.

In view of the opinions of the Supreme Court of the United States and of the appellate court of New York, above cited, I must advise the honorable House of Representatives that there now appears judicial determination of high authority holding that the proposed legislation is within the constitutional limitations.

PAUPER — DISEASE DANGEROUS TO PUBLIC HEALTH — REMOVAL TO STATE HOSPITAL — EXPENSES OF TRANSPORTATION.

The State Board of Charity is authorized, by R. L., c. 85, § 14, to direct the local authorities to remove to the State Hospital a State pauper found within the limits of their jurisdiction who is afflicted with the disease of leprosy; and in case such removal is ordered, the expense of transportation must in the first instance be borne by the town, which is entitled to subsequent reimbursement from the Commonwealth "for the excess over thirty miles by the usual route, at a rate not exceeding three cents a mile," in accordance with the provisions of R. L., c. 85, § 9.

You request my opinion upon the following questions relating to the removal to the State Hospital of an unsettled pauper now resident in the town of Harwich, and stated to be infected with a disease which is diagnosed as leprosy.

To the Superintendent of State Adult Poor.
1904
May 10.

1. Has the State Board of Charity any authority, under the statutes, to order his removal from the town of Harwich?

2. If the above interrogatory is answered in the affirmative, and the State Board of Charity orders the removal by the authorities of the town of Harwich, should the expenses of such removal be borne by the Commonwealth?

It is my opinion that the State Board of Charity has authority to order the removal of such pauper to the State Hospital.

R. L., c. 85, § 14, provides:—

No city or town officer shall send to the state hospital any person who is infected with smallpox or other disease dangerous to the public health, or, except as provided in section ten, any other sick person whose health would be endangered by removal; but all such persons who are liable to be maintained by the commonwealth shall be supported during their sickness by the city or town in which they are taken sick, and notice of such sickness shall be given in writing to the state board of charity, which may examine the case and, if found expedient, order the removal of the patient; but such notice in the case of sick persons whose health would be endangered by such removal shall be signed by the overseers of the poor or by a person appointed by them by special vote, who shall certify, after personal examination, that in their or his opinion such removal at the time of his application for aid would endanger his health.

A city or town officer who knowingly violates the provisions of this section shall be punished by a fine of not less than fifty nor more than one hundred dollars.

The natural interpretation of this statute is, that "all such persons who are liable to be maintained by the commonwealth" includes "any person who is infected with smallpox or other disease dangerous to the public health," as well as "any other sick person whose health would be endangered by removal." Moreover, the language of the requirement, that "such notice in the case of sick persons whose health would be endangered by such removal shall be signed by the overseers of the poor . . . who shall certify . . . that . . . such removal . . . would endanger his health," implies an intent of the Legislature that notice be required in the case of both classes of persons; and if the provision as to notice so applies, the provision as to ordering removals is also applicable.

Such seems to be the meaning of the section as it stands; and whatever may be the effect of Acts of 1902, c. 213, § 1, providing that "notice shall be given to the state board of health in accordance with the provisions of section fifty-two of chapter seventy-five of the Revised Laws," which section is as follows: —

If the board of health of a city or town has had notice of a case of smallpox, diphtheria, scarlet fever or of any other disease dangerous to the public health therein, it shall within twenty-four hours thereafter give notice thereof to the state board of health stating the name and the location of the patient so afflicted, and the secretary thereof shall forthwith transmit a copy of such notice to the state board of charity, —

on the requirement of notice, it certainly does not repeal or revise the provision conferring authority to remove a pauper. Nor do the statutes providing for the care of persons infected with diseases dangerous to the public health (see R. L., c. 75, §§ 35 to 58, inclusive; Acts of 1902, c. 206) contain anything inconsistent with this view of the law.

It is my opinion, in reply to your second inquiry, that the town must bear the expense in the first place, and that the Commonwealth must reimburse such town for the expense of trans-

portation, for the excess over thirty miles by the usual route. R. L., c. 85, § 9, provides:—

Cities and towns may, at their own expense, send to the state hospital, to be maintained at the public charge, all paupers who may fall into distress therein, and who have no settlement within the commonwealth. The city or town shall be reimbursed by the commonwealth, upon bills approved by the state board of charity, for the expense of transportation of each state pauper thus sent, for the excess over thirty miles by the usual route, at a rate not exceeding three cents a mile.

It appears from this statute that the town or city sending a State pauper to the State Hospital is entitled to be reimbursed for a part of the expense incurred. Payment for transportation expenses was authorized in Acts of 1852, c. 275, § 8, in the original statute establishing State almshouses. The first provision for payment applied to all paupers sent to such institutions, and no exception to the operation of the statute authorizing removals was made in the case either of persons whose health would be endangered or of those who were infected with dangerous diseases. Later statutes, beginning in 1855, made these exceptions. See Acts of 1855, c. 445, § 2; Acts of 1865, c. 162; P. S., c. 86, § 25; Acts of 1885, c. 211; R. L., c. 85, § 14; Acts of 1887, c. 440; R. L., c. 85, § 10; Acts of 1903, c. 233. In Acts of 1865, c. 162, and succeeding acts, including R. L., c. 85, § 14, authority is given to the Board of Charity, in either one of these exceptional cases, to "examine the case, and, if found expedient, order the removal of the patient." It is to be noted that the removal is to be "ordered," not made, by the Board; which leads to the conclusion that an order of the Board of Charity merely puts the case, otherwise within the exception, on the same footing as a case not within the exception. This being true, the provision for reimbursement under R. L., c. 85, § 9, applies to a case in which the Board of Charity has ordered the removal. Additional ground for this interpretation appears in the fact that no greater reason appears why a town should bear the expense of transportation of a pauper within the special classes than of one who is not; and that it may fairly be assumed that the statutes regarding the excep-

tional cases were passed for the protection of the health of pauper and public, rather than with any idea of changing the burden of the expense of transportation.

STATUTE OF LIMITATIONS — ASSESSMENT OF COMPENSATION
FOR DISPLACEMENT OF TIDE WATER.

The statute of limitations does not run against the Commonwealth in the matter of the assessment and collection of the tax imposed under R. L., c. 96, § 23, upon the displacement of tide water.

To the Board
of Harbor and
Land Commis-
sioners.
1904
May 11.

The Harbor and Land Commissioners ask the opinion of the Attorney-General whether the statute of limitations will run against the Commonwealth in the assessment and collection of a tax for tide-water displacement under R. L., c. 96, § 23.

The statute is as follows: —

SECTION 23. The amount of tide water which is displaced by any structure below high water mark, or by any filling of flats, shall be ascertained by the board, which shall require the persons who cause such displacement to make compensation therefor by excavating, under its direction, between high and low water mark in some part of the same harbor a basin for a quantity of water equal to that displaced; or by paying in lieu of such excavation an amount assessed by said board, not exceeding thirty-seven and one-half cents per cubic yard of water displaced; or by improving the harbor in any other manner satisfactory to the board; and the money shall be paid into the treasury of the commonwealth, and be reserved as a compensation fund for such harbor. The income thereof may be used under the direction of the board for the improvement of the harbor. An assessment for tide water which has been displaced may be recovered in an action of contract in the name of the treasurer and receiver general.

R. L., c. 202, § 2: —

The following actions shall, except as otherwise provided, be commenced only within six years next after the cause of action accrues:

First, Actions of contract founded upon contracts or liabilities, express or implied. . . .

Section 17: —

The limitations of the preceding sections of this chapter . . . shall apply to actions brought by the commonwealth or for its benefit.

When does the Commonwealth's right of action to collect an assessment for a displacement of tide water accrue? Before the assessment of the Harbor and Land Commissioners the Treasurer has no legal means of ascertaining the amount of the Commonwealth's claim and cannot sustain an action. His right, therefore, accrues at the date of the assessment. He must bring suit to collect the assessment within six years after it was levied.

No cause of action accrues to the Commonwealth until the Board of Harbor and Land Commissioners has made the assessment. Is the Board required to assess within six years after the displacement of tide water? The statute does not in terms limit the time.

The situation is somewhat similar to the case of an obligation which becomes fixed only upon the making of a demand. The doctrine has been stated by many courts, that a person who is entitled to a payment after a demand which he may make when he chooses is bound to make demand within a reasonable time, in order to preserve his rights as against the statute of limitations. In *Shaw v. Silloway*, 145 Mass. 503, it was said that this question had not been considered in Massachusetts.

In *Campbell v. Whoriskey*, 170 Mass. 63, the court said:—

It has sometimes been held, or seemingly assumed, that, even if many years are permitted to elapse without a demand, the statute will not begin to run until the demand is made. . . . Under this doctrine, carried to its extreme limit, a liability to a suit upon a claim might continue for an indefinitely long time. The extreme doctrine in the other direction is, that the "cause of action accrues for the purpose of setting the statute in motion as soon as the creditor by his own act, and in spite of the debtor, can make the demand payable." . . . In some of the cases it is held that a demand must be made within a reasonable time, and that a reasonable time will not in any event extend beyond the statute period for bringing such an action. . . . In *Codman v. Rogers*, 10 Pick. 112, 120, Mr. Justice Wilde said: "A demand must be made within a reasonable time; otherwise the claim is considered stale, and no relief will be granted in a court of equity. What is to be considered a reasonable time for this purpose does not appear to be settled by any precise rule. It must depend on circumstances. If no cause for delay can be shown, it would seem reasonable to require the demand to be made within the time limited by the statute for bringing the action. There is the same reason for hastening the demand, that there is for hastening the commencement of the action; and in both cases the same presumptions arise from delay." Although

he was merely stating the doctrine of laches in a suit in equity, his language has been quoted and referred to in several of the cases above cited as stating the true principle applicable to actions at law. . . .

We are of opinion that the true principle is that the time when the demand must be made depends upon the construction to be put upon the contract in each case. If the contract requires a demand without language referring to the time when the demand is to be made, it is as if the words "within a reasonable time" were found in it. What is a reasonable time is a question of law, to be determined in reference to the nature of the contract and the probable intention of the parties as indicated by it. Where there is nothing to indicate an expectation that a demand is to be made quickly, or that there is to be delay in making it, we are of opinion that the time limited for bringing such an action after the cause of action accrues should ordinarily be treated as the time within which a demand must be made. See *Jameson v. Jameson*, 72 Mo. 640. . . . Such a rule seems fairly to apply the principles and analogies of the statute of limitations to the contract of the parties, and it is in accordance with the weight of authority in this Commonwealth and elsewhere.

This doctrine of the Massachusetts court applies the principle of the statute of limitations by analogy to a case not included in the statute. It is an extension of the equitable doctrine of laches to a situation arising at common law. The question is, whether this principle should be applied against the Commonwealth, so that the Treasurer's action, brought to recover an assessment, must fail if a board over which he has no control neglected to levy the assessment within six years after the displacement.

It is a general principle that a right in behalf of the Commonwealth does not fail because of the laches of its officers. *State v. Brewer*, 64 Ala. 287; *Haehnlen v. Commonwealth*, 13 Penn. State, 617; *State v. Sponaule*, 45 West Va. 415. Compare *Commonwealth v. Bala, etc., Turnpike Company*, 153 Penn. State, 47.

The statute of limitations itself could not defeat the right of the Commonwealth except that it is expressly applied to actions by the Commonwealth in R. L., c. 202, § 17. The Commonwealth has all the rights and prerogatives of a sovereignty until by statute it yields them up. One of these prerogatives is expressed in the maxim "*Nullum tempus occurrit regi.*"

I am inclined to the view, there being no authority upon either side of the narrow question, that the principle of the statute of limitations should not by analogy be extended to bar this right of the Commonwealth to levy an assessment which is not expressly limited in time. In any event, if the Treasurer desires to bring suit within six years to recover an assessment levied more than six years after a displacement, the question whether he may maintain such action is worthy of a test case.

CONSTITUTIONAL LAW — OBLIGATIONS OF CONTRACT — EAST BOSTON TUNNEL — BONDS — TOLLS.

St. 1897, c. 500, § 17, which authorizes the construction by the Boston Transit Commission of the East Boston tunnel, and its subsequent lease to the Boston Elevated Railway Company at an annual rental fixed thereby and payable to the city of Boston, by pledging such rental together with the tolls which the city is directed to collect from persons passing through such tunnel, "to meet the principal and interest of the bonds issued to pay for the construction of said tunnel," and expressing such pledge upon the face of the bonds "as one of the terms thereof," creates a valid contract between the city of Boston and the purchasers of such bonds, which cannot be impaired by subsequent legislation; and House Bill No. 1192, which abolishes such tolls, and instead thereof requires the city of Boston to set aside from the compensation received by it from the Boston Elevated Railway Company under St. 1897, c. 500, § 10, a sum equal to the amount which it would have received from such tolls, to be pledged in like manner to meet the principal and interest of the bonds, for the reason that it varies the terms of such contract by substituting for the source of income pledged to secure the bondholders another and different source of income, is unconstitutional and void.

The committee on metropolitan affairs has requested my opinion upon the constitutionality of House Bill No. 1192, entitled "An Act relative to the payment of tolls in the East Boston tunnel."

To the Committee on Metropolitan Affairs.
1904
May 16.

This bill is intended to amend St. 1897, c. 500, § 17, which authorizes the construction of the East Boston tunnel, and contains the provision that upon the completion of the tunnel the Rapid Transit Commission shall execute a lease thereof in writing to the Boston Elevated Railway Company, for a term expiring twenty-five years from the date of the passage of the act, at an annual rental equal to three-eighths of one per cent. of

the gross receipts for each year, ending September 30, of all lines owned, leased or operated by the corporation, to be paid to the city of Boston on or before the last day of November in each year, which rental shall be in full compensation for the exclusive use of said tunnel by said corporation, its sub-lessees, successors or assigns. Such other terms and conditions may be incorporated in the lease as may be agreed upon by the commission and the corporation, or, in case of disagreement, as shall be determined by the Board of Railroad Commissioners.

The material part of the section is as follows:—

Said city shall collect from each person passing through said tunnel in either direction a toll of one cent: *provided, however*, that if in any year ending on the thirtieth day of September the receipts from such tolls, together with the rental above-provided for, amount to a sum so in excess of the interest and sinking fund requirements of said bonds for that year that the board of railroad commissioners is of opinion that the toll may be reduced, said board shall on petition of ten citizens of said city establish such reduced toll for the period of one year from the first day of January next ensuing, as will in its opinion yield an amount sufficient to meet, with said rental, said interest and sinking fund requirements for that year; or said board may altogether discontinue such toll when it is of opinion that such rental alone is sufficient to meet said requirements; but any such reduction shall be carried into effect by a provision for the sale of tickets, and the cash fare shall continue to be one cent. The whole amount of such tolls and of said rentals is hereby pledged to meet the principal and interest of the bonds issued to pay for the construction of said tunnel or tunnels, and this pledge shall be expressed on the face of such bonds as one of the terms thereof; *provided, however*, that after such tolls have been discontinued if said rentals shall for any year ending on the thirtieth day of September yield an amount more than sufficient to meet the interest and sinking fund requirements of said bonds for such year such excess over said requirements shall be regarded as general revenue of said city. In case in any year the rentals and tolls above-provided for shall not yield a sufficient amount to meet said interest and sinking fund requirements the compensation received by said city under section ten of this act shall be applied so far as may be necessary toward meeting such requirements. Said corporation shall be the agent of said city to collect such tolls under such arrangements as shall be agreed upon by said city and said corporation, or in case of disagreement, as shall be determined by the board of railroad commissioners.

House Bill No. 1192 amends this section by striking out the provision above quoted with regard to the collection by the city of a toll of one cent, to be collected from each person passing through the tunnel in either direction, and enacting in place thereof the following:—

Said city shall set aside from the compensation received by said city under section ten of this act a toll of one cent for each person passing through said tunnel in either direction.

Section 10, herein referred to, provides that the Boston Elevated Railway Company may establish a maximum toll or fare of five cents, which sum shall not be reduced by the Legislature during the period of twenty-five years from and after the passage of this act; and further provides for a payment, as compensation for the privileges therein granted and for the use and occupation of the public streets, squares and places by the lines of elevated and surface railroad owned, leased and operated by the corporation, of an annual sum, the amount of which is to be determined by the amount of the annual dividend paid in each year, as therein provided. "The above sum shall be paid into the treasury of the Commonwealth and distributed among the different cities and towns in proportion to the mileage of elevated and surface main track reckoned as single track which is owned, leased and operated by said corporation and located therein."

The question submitted is whether or not the change made by House Bill No. 1192 is unconstitutional as impairing obligations of contract.

A consideration of the statutes above referred to in my opinion clearly shows that no obligation of contract subsisting between the Commonwealth and the Boston Elevated Railway Company is impaired or affected by the proposed amendment; and the bill, if unconstitutional, must be so by reason of the existence of a contract between the city and the purchasers of the bonds referred to in §§ 17 and 18, which is impaired by its provisions.

The first question to be determined, therefore, is, whether or not such a contract exists. Section 17 provides that the city shall collect a toll of one cent from each person passing through the tunnel in either direction, and for an annual rental of three-eighths of one per cent. of the gross annual earnings of the corporation, the amount received from both these sources being *pledged* to meet the principal and interest of bonds issued to pay for the work of constructing such tunnel. This pledge is expressed upon the face, and forms one of the terms of each of such bonds, and, in my opinion, constitutes a valid contract between the city and the bondholders, the obligations of which cannot be impaired by any subsequent legislation.

The second question to be considered is, whether the change proposed to be made by House Bill No. 1192 is an impairment of the obligation created by this contract.

It is to be observed that the pledge above referred to is obviously designed to afford security for the full and timely payment of the principal and interest of the bonds issued to pay for the work of constructing the tunnel, by specifically devoting a certain income to that purpose. If the income as assigned exceeds the amount necessary, the surplus may be treated as the general revenue of the city of Boston. If, on the other hand, the specified sources are not sufficient to provide the necessary sum, a third source of income is made available, namely, the income received by the city as compensation for the use of the public streets, ways and places, under the provisions of § 10. If, after experiment, it appears to the Board of Railroad Commissioners that the tolls and rental exceed the amount required for principal and interest of the bonds issued by the city, they may reduce the toll by making provision for the sale of tickets, though cash fares must still be paid in the same amount by passengers; and if the rental alone becomes sufficient for the specified purposes, the tolls may be discontinued.

House Bill No. 1192 in effect abolishes one source of income, viz., the tolls, and provides that the amount which would have been furnished to the city from such tolls shall be payable out of the compensation received by the city under § 10. This may

or may not diminish or materially affect the sources of income available as security for the bonds issued, since the amount received as compensation under § 10 by the city may or may not be sufficient to provide for all deficits which may exist from year to year in the rental, the significant effect of the provision being to abolish the tolls entirely. This, in my judgment, constitutes a material interference with and impairment of the obligation of contract between the city and the bondholders, created by § 17. If the effect of the proposed legislation were merely to substitute one security for another of equal value, it would be, if compulsory, objectionable on constitutional grounds; if the compulsory substitution be to provide a security of less value than the original, or one of a lower grade, it certainly conflicts with constitutional requirements.

It is forcibly argued, by those in favor of House Bill No. 1192, that the change suggested is merely one of bookkeeping, transferring the liability to pay the amount due as tolls from the general public to the city of Boston, and designating the sum from which it is to be drawn; and that, as regards the bondholders, the contract is not in any respect affected.

It appears, however, upon careful consideration, that the change is more material than the petitioners admit.

Section 17 provides a scheme for meeting the interest and sinking fund requirements of the bonds issued, which involves the setting aside of a certain fixed and definite income as it accrues, and dedicating and appropriating the same, directly and in specie, to meet the bond obligations; and further provides that the tolls paid by the public shall be discontinued upon certain contingencies set forth by the Board of Railroad Commissioners. This scheme and these conditions may well have been, and in my opinion were, considerations of weight with those intending to purchase bonds, when coupled with the distinct pledge that the receipts from such sources should be set aside for meeting the obligations of the bonds; and for this reason the conditions prescribed are material to the contract, and formed a consideration for the purchase of the bonds.

The adjudicated cases upon this subject seem clearly to recog-

nize the principle that the power of taxation as it existed at the time when the contract was made becomes a part of the contract, and, if necessary, can be availed of by the creditor under such contract without regard to subsequent legislation. *Von Hoffman v. City of Quincy*, 4 Wall. 535; *Ralls County Court v. United States*, 105 U. S. 733, 738; *Mobile v. Watson*, 116 U. S. 289. In these cases the power to tax was the general power of taxation vested in the municipality; and the courts, in substance, held that if, under subsequent changes in the method of taxation and in the classes of property to be taxed, the income derived from such taxation was insufficient to meet the requirements of the contract, the obligation of contract was impaired to the extent of the deficiency thus created.

Where a special tax levy or a special fund raised by taxation is made security for the payment of contract obligations, the creditor may insist upon payment from that source, notwithstanding the repeal of the law by which it was established. *Seibert v. Lewis*, 122 U. S. 284, 290; *Nelson v. St. Martin's Parish*, 111 U. S. 716. A contract of this character is discussed in *Louisiana v. Pillsbury*, 105 U. S. 278, at pp. 287, 288:—

These provisions, until the bonds were accepted, were in the nature of proposals to the creditors of the old city, of the municipalities, and of Lafayette. The State in effect said to them: the city will give these bonds, running for the period designated, and drawing interest, in exchange for your demands; and as security for the payment of interest, and the gradual redemption of the principal, the city shall annually, in January, levy a special tax for that purpose to the amount of \$650,000. The provisions were designed to give value to the proposed bonds in the markets of the country, and necessarily operated as an inducement to the creditors to take them. When the bonds were issued and taken by the creditors, a contract was consummated between them and the city as fully as if all the provisions had been embodied as express stipulations in the most formal instrument signed by the parties. On the one hand, the creditors surrendered their debts against the former municipalities; and, on the other hand, in consideration of the surrender, the city gave to them its bonds, which carried the pledge of an annual tax of a specified amount for the payment of the interest on them, and ultimately of the principal. The annual tax was the security offered to the creditors; and

it could not be afterwards severed from the contract without violating its stipulations, any more than a mortgage executed as security for a note given for a loan could be subsequently repudiated as forming no part of the transaction. Nearly all legislative contracts are made in a similar way. The law authorizes certain bonds to be issued, or certain work to be done upon specified conditions. When these are accepted, a contract is entered into imposing the duties and creating the liabilities of the most carefully drawn instrument embodying the provisions. *Von Hoffman v. City of Quincy*, 4 Wall. 535; *Hartman v. Greenhow*, 102 U. S. 672; *People v. Bond*, 10 Cal. 563; *Brooklyn Park Commissioners v. Armstrong*, 45 N. Y. 234.

The case now under consideration appears to be identical in principle with those decisions which deal with a specific source of income appropriated to the discharge of the obligation incurred under the contract; and there are a number of decisions which deal with facts substantially like those under discussion.

In *Liquidators v. Municipality*, 6 La. Ann. 21, an act of Legislature was passed in the State of Louisiana to provide for the payment of the debts of a municipal corporation, which authorized the creation of a sinking fund, which was to be deposited and to be applied as specified in the act. In cases where creditors, acting thereunder, had surrendered the evidences of their debts and received new bonds, for the payment of which the fund was pledged, it was held not competent for a subsequent Legislature, in providing for the payment of the corporate debts, to give a different destination to the sinking fund by changing the depository of the fund, such change being held to be an impairment of the obligation of the contract. In *Fazende v. City of Houston*, 34 Fed. Rep. 95, where a municipal corporation, under an ordinance authorized by its charter, issued bonds to provide for erecting a market house, and agreed in the bonds that the revenue from the market should be devoted to the payment of the interest on the bonds and to the formation of a sinking fund for their redemption, it was held that the city could make no other disposition of such revenue. So in *Brooklyn Park Commissioners v. Armstrong*, 45 N. Y. 234, where bonds were issued by a municipality to raise funds for the payment of lands for a park, and the lands were

specifically pledged for such payment, it was held that a subsequent act of Legislature, authorizing a sale of such lands, free of trust and of existing liens under the original act, could not be sustained, such act being an impairment of the obligation of contract. See also *Dillingham v. Hook*, 32 Kan. 185. In *City of St. Louis v. Sheilds*, 52 Mo. 351, the facts were substantially like those now before me. The court held that, upon the repeal of a statute which authorized the city of St. Louis to raise money, by the issue of bonds, for harbor improvements and the construction of wharves, and established a wharf tax upon all real estate in such city, which, together with the revenue derived from the wharves after completion, was pledged to meet the payment of interest and to provide for the establishment of a sinking fund for the redemption of the bonds, no contractual relation existed as between the city and the State, and no obligation of contract was impaired by such repeal. It is to be observed, however, that the bondholders were not before the court; and it is intimated in the opinion that, were "the bondholders asking for a protection of their rights and showing that the collection of their debts was impaired, a different case would be presented:" and in *Gilman v. Sheboygan*, 2 Black (U. S.), 510, to the same effect, the bondholders were not before the court.

I am therefore of opinion that, in so far as House Bill No. 1192 is designed to change the conditions and scheme of payment and the obligations to secure the same under which the bonds issued to pay for the construction of the East Boston tunnel were sold, and which formed a consideration in such sale, it is unconstitutional.

CONSTITUTIONAL LAW — VETO. POWER OF EXECUTIVE — LEGISLATURE — PASSAGE OF BILL OR RESOLVE OVER VETO — TWO-THIRDS OF BRANCH ORIGINATING MEASURE.

The Constitution of Massachusetts, Part II., c. I., art. II., by providing that where the veto power of the Executive is exercised, the bill or resolve, with his objection thereto in writing, shall be returned to that branch of the Legislature in which such bill or resolve originated, two-thirds of which branch may upon reconsideration agree to pass the same, and if approved in the other branch by two-thirds of the members present, it shall have the force of a law, — imposes upon that branch of the Legislature in which a particular act originates a different relation to and responsibility for such act from that attaching to the other branch, and requires that "two-thirds of the said Senate or House of Representatives," whichever may have originated the measure, should be two-thirds of the full membership thereof, and not merely two-thirds of the members present, as in the case of the remaining branch.

It follows that St. 1904, c. 458, which originated in the House of Representatives, and which was therein passed over the veto of the Executive by a two-thirds vote of the members then present, but not by a two-thirds vote of its entire membership, was not passed over such veto in accordance with the provision of the Constitution (Part II., c. I., art. II.), and is null and void. The Treasurer has no authority, therefore, to issue the bonds authorized and required by the terms of such statute.

I have the honor to acknowledge your communication of June 15, in which you ask my opinion as to the "constitutionality and legality" of c. 458 of the Acts of 1904, which communication has had my attention and study since its receipt.

To the
Treasurer
and Receiver-
General.
1904
July 11.

I am advised that the act in question originated in the House of Representatives, and I am informed that after the said act had been returned to that body by His Excellency the Governor, without his approval and accompanied by his reasons therefor, it appears by the journal of the House that two-thirds of its entire membership did not vote affirmatively to pass the said act, notwithstanding the Executive veto. I am further informed that two-thirds of the members of the House present and voting did, however, affirmatively vote to pass the act, notwithstanding the veto.

The question you raise is one of very serious importance. I take it to comprise an inquiry as to the constitutionality of the law, assuming it to have been duly enacted, as well as the question whether, as matter of law, it has been enacted at all, in view of the Executive veto.

If the statute has been lawfully enacted, I am of opinion that I should not be justified in declaring it to be unconstitutional. The Supreme Judicial Court must determine that question, if it be raised. I therefore confine my attention, investigation and discussion to the more specific inquiry, and the more important, in view of my duty, — whether it was in law enacted, in view of the facts which I accept as above stated.

The constitutional provisions upon which this question must be determined are to be found in c. I., art. II., of Part the Second of the Constitution of this Commonwealth, the material part of which is to be found in the paragraphs defining the veto power of the Executive, the language being: —

But if he have any objection to the passing of such bill or resolve, he shall return the same, together with his objections thereto, in writing, to the senate or house of representatives, in whichever the same shall have originated; who shall enter the objections sent down by the governor, at large, on their records, and proceed to reconsider the said bill or resolve. But if after such reconsideration, two-thirds of the said senate or house of representatives, shall, notwithstanding the said objections, agree to pass the same, it shall, together with the objections, be sent to the other branch of the legislature, where it shall also be reconsidered, and if approved by two-thirds of the members present, shall have the force of a law.

There is an obvious difference in the phraseology defining the reconsideration and re-enactment of a law, notwithstanding the Executive veto, with regard to the two branches of the Legislature, the one in which the act originated and the other whose action supplements that of the branch in which the law had its origin; in the case of the branch originally acting, it being required that there must be an affirmative vote of two-thirds of the said Senate or House of Representatives; and in the other case, the affirmative vote required being two-thirds of the members present. Whether the omission in the one requirement of the word "present" and its appearance in the other be intentional or accidental, suggests the first line of inquiry which my investigation pursues.

The presumption must be that the terms and provisions of the

Constitution find place through the intent of its framers, rather than through accident or inattention. I must therefore conclude that the difference of phraseology in the two sections above cited was intentional; and my inquiry is, in consequence, confined to the question whether this difference of phrase leads to a necessary difference of vote in the two houses required to enact a law, notwithstanding the veto of the Governor.

That the attention of the framers of the Constitution was directed especially to this section is apparent from the report of the constitutional convention of 1779-80. The report of that convention, which is very incomplete and unsatisfactory, states that a motion was made to insert the words "being equal in numbers to those present at the passing thereof." The report does not state at what point in the section these words were to be inserted. The convention, however, declared in favor of the paragraph in its present form. See *Journal of the Convention, 1779-80, Boston, 1832*.

The record of the constitutional convention of 1853 presents an interesting and suggestive discussion of the question before me, though it furnishes no decisive authority. *Debates in Massachusetts Convention, 1853*, volume III., page 662 *et seq.* A committee of the convention reported a revision of art. IV., by which revision the word "present" was inserted and made applicable to the vote required for enactment after a veto, by the body in which the act originated. It was contended by Mr. Lord of Salem that the insertion of the word effected a palpable alteration of the Constitution, which was beyond the authority of the reporting committee. Upon a question of order, whether the report, by reason of the change of phrase, did transcend the authority of the committee, the presiding officer of the convention ruled that it did not, since, in the opinion of the Chair, "the insertion of the word 'present' does not change the substance of the article; the experience of the Chair has been invariably that a question has been considered settled on receiving the assent of two-thirds of the members present and voting thereon. The Chair does not therefore regard it as changing the substance of the article." Mr. Lord earnestly and forcibly argued that the

inserted word "present" did change the meaning of the Constitution; and he was opposed to such insertion, both because it was beyond the authority and province of the committee, as well as upon the broader ground that it diminished the vote required to override an Executive veto. He thereupon moved that the report of the committee be amended by striking out the word "present." The question was taken upon this motion, and upon a division the vote stood, ayes 63, noes 162, and Mr. Lord's amendment was rejected.

The Constitution, with art. IV. containing the inserted word "present," was adopted by the convention, but the new draft of the Constitution was rejected by popular vote. It thus appears that an attempt to amend the Constitution by the insertion of a word claimed by some to be only a change of phrase without change of meaning, and by others to be a change of substance, failed of accomplishment through the disapproval of the people, and so the attempt to remove the doubt of construction, if it were only such, failed; and it is also obvious that the express provision requiring only a two-thirds vote of members present for the passage of an act over the Governor's veto, if such were a change in the constitutional requirement, was not ratified by the popular assent.

Article XXXIII. of Amendments to the Constitution, adopted November 3, 1891, is as follows:—

A majority of the members of each branch of the General Court shall constitute a quorum for the transaction of business, but a less number may adjourn from day to day, and compel the attendance of absent members. All the provisions of the existing Constitution inconsistent with the provisions herein contained are hereby annulled.

This amendment does not, in my opinion, affect the question before me, or aid in its determination. None of the pre-existing provisions of the Constitution affecting this question are inconsistent with, or in consequence annulled by, those of this amendment, which merely defines what shall constitute a quorum for the transaction of business in either branch of the General Court, and was evidently directed to and in amendment of art. IX. of c. I. of § II. and art. IX. of c. I. of § III. of the Constitution.

A constitutional requirement fixing the minimum vote necessary for affirmative action upon a specific proposition or question is not, in my opinion, affected by a provision designating the limit of attendance without which ordinary business cannot be transacted. Unless an amendment revises the whole subject embraced by the previous constitutional provision, the latter cannot be held to have been repealed by implication; especially as it may be given, as in this case, full effect without conflict or inconsistency with the subsequent amendment. See *Harnden v. Gould*, 126 Mass. 411.

I have examined the reported rulings of presiding officers of the House and Senate upon the construction of the constitutional provision under consideration, and it appears to have been held that in the branch first taking action a vote of two-thirds of the members present is sufficient to pass a bill, notwithstanding a veto. Clifford, S., 1862, page 625; Bullock, H., 1862, page 586. But such decisions, not being upon the construction of the rules of the Senate or House, but upon the organic law superior to and controlling all legislative action, can neither be final, nor, indeed, be held to carry any authority beyond that of the learning and sound wisdom of the eminent gentlemen who declared them.

The dissenting opinion of Mr. Justice Bradley, in *County of Cass v. Johnston*, 95 U. S. 370, most forcefully presents reasons bearing high intrinsic authority of a great jurist, to the effect that, in the absence of qualifying or limiting words, a constitutional requirement of a specific vote of a given body means such vote of the entire body, not such proportion of the members thereof as may at any assumed moment participate in the vote.

The opinion of Mr. Justice Bradley appears to me consonant with the true principle governing this inquiry, and would by itself justify grave doubt whether, in the case before me, a two-thirds vote of members present in the house of origin of the bill satisfied the requirement of the Constitution, even if the phrase of requirement were identical as applied to action in both houses; and this view is directly sustained in the case of *State v. Gould*, 31 Minn. 189.

There are authorities, however, which hold that the word "house," where context, subject or condition suggests or induces such conclusion, is to be construed as meaning a quorum of such house. *Southworth v. Palmyra & Jackson Railroad Company*, 2 Mich. 287; *Green v. Weller*, 32 Miss. 650. The reason upon which these decisions rest is absent from the case before us, since it is here apparent that peculiar responsibility and gravity attach to that vote which is to nullify an Executive veto; and it is therefore to be distinguished from routine action, incident to the mere transaction of ordinary legislative business. Again, the context under consideration before us exhibiting a difference in phrase forbids that generalization of reason which carried the opinion of the court in the cases above cited. In the construction of statutes, and much more so in that of the Constitution, it is the safe method to give effect to the particular words. When in the same sentence different words are used, the courts of law will presume that they were used in order to express different ideas. *Parkinson v. State*, 14 Md. 184, 197.

Where there is such difference of phrase as that plainly before us, that difference must be held to have an intentional significance, which I certainly can not and shall not assume to ignore by any rule of construction which holds that the word "present" in the second clause and absent in the first is mere heedless surplusage, the result of a want of consideration or inattention on the part of the framers of the Constitution, or the result of an incapacity that must await the charitable constructive assistance of commentators of a later day. I am of opinion that our Constitution took its vigor at the moment of its adoption and in the very phrase of its expression, and that no one of its provisions can be discarded, or that phrases of different form and import are yet to be held as of the same intent by any authority, save that of the decision of that tribunal to which its construction was by its own precept committed, — the Supreme Judicial Court.

I cannot doubt that the courts will recognize a distinction in the phrases about which our inquiry centres; and unless it shall be held that these apparent distinctions are, nevertheless, to be

construed as of the same effect and tenor, it must follow that an act can be passed, notwithstanding the Executive veto, only in the event that two-thirds of the entire membership of the house in which the act originated shall vote to pass the same, notwithstanding the veto; as it must certainly be held that the act may be passed, notwithstanding such veto, by the other house, if two-thirds of the members present so vote.

I think, in view of such obvious difference in phraseology and apparently of such significance, it must be left to the courts of competent jurisdiction alone to declare that the framers of the Constitution nevertheless intended that no distinction should exist. A careful search of the reports of judicial construction has failed to disclose to me any such declaration; indeed, I have been able to discover no adjudication directly bearing upon this issue. I am therefore left to pursue such lines of reasoning as appear to me to be sound and conclusive, realizing that, however they may so appear to me, they must still fail to carry that authority which can alone settle and determine the important question which your inquiry presents. But since you have sought, and may feel that you must govern your official action by, such opinion as I can render to you, I deem it my duty to suggest some of the reasons which guide me to the conclusion which I submit.

Assuming that full weight must be given to each and all of the provisions of the Constitution, and assuming that each is there inserted for a purpose, for every clause and word even of a statute shall be presumed to have some force and effect (see *Opinion of the Justices*, 22 Pick. 571; *Browne v. Turner*, 174 Mass. 150, 160), I conclude that the framers of the Constitution intended that that branch of the Legislature in which the act in question originated should hold a different relation and responsibility to it than that attaching to the action of the other branch; and it well may be, as it indeed appears, that the Constitution intended that an act could be passed over the Executive veto only in the event that that house which was responsible for its original adoption had, on reconsideration after an Executive veto, passed it by a vote of two-thirds of its entire

membership; and that such enactment, notwithstanding an Executive veto, should not depend upon the hazard of an attendance at the time of such final action measured by a mere quorum of the body. This line of reasoning of course presupposes, as I do, that the constitutional intent was that passage, notwithstanding a veto, should require a larger vote than that dependent upon a mere two-thirds of a quorum.

Taking up for a moment an analysis of the provisions relating to action by that house other than the one in which the act originated, I proceed to consider whether its requirements can be so construed as to be equivalent to or of like effect with those relating to the house of the origin of the bill, and it seems to me manifest that the vote required in the former case is obviously less than that required in the latter; nor can the two provisions be made, by any process of reasoning apparent to me, to be of the same significance.

Whether there was or was not good or sound reason for the apparent difference of requirement set forth in the Constitution, is certainly beyond the legitimate field of my inquiry. If such a distinction appears, and is held to be conclusive of the intent of the Constitution, it must and will be recognized and enforced by the courts, resulting, if my line of reasoning be accurate, in judicial declaration that, unless two-thirds of the entire membership of the house of the origin of the bill vote affirmatively to pass it, notwithstanding a veto, there has been no enactment in law, and the supposed statute is in consequence a mere nullity.

Entertaining the opinion which I do and which I have herein stated, I must declare to you that in my opinion the act to which you call my attention is without validity, and is in law as if it had never appeared upon our statute book. In reaching this conclusion, I am not unmindful that a law duly enacted should be presumed to be constitutional until the courts of competent jurisdiction have finally otherwise decided; but it is to be observed that the question submitted to me and by me considered is not whether there was constitutional authority for this enactment vested in the Legislature, but whether the Legislature has acted within the limitations and according to the authority of

the Constitution in the assumed passage of the act; in other words, I do not deal with the construction of the act itself with relation to constitutional questions, but I confine myself wholly to an inquiry as to the construction of the Constitution itself upon which the existence rather than the validity of the act is to be determined.

I therefore am constrained to advise you, in conclusion, that there is grave doubt whether you have any official authority or power to issue instruments which, upon their face and in form, shall declare an obligation of the Commonwealth. The issuance of bonds in tenor and form binding upon the State must have, in their inception, clear, unquestioned and unassailable authority. Upon the state of facts which I have assumed, and upon that construction of the Constitution to which my own judgment leads me, I am required to say that such authority does not, in my opinion, exist.¹

INSURANCE — AUTHORITY OF FOREIGN FIRE INSURANCE CORPORATION TO DO BUSINESS WITHIN THE COMMONWEALTH — REVOCATION — REINSURANCE.

When it appears that a foreign fire insurance corporation admitted to do business in this Commonwealth has reinsured risks on Massachusetts property in fire insurance companies not so admitted, without filing the affidavit required by R. L., c. 118, § 83, to the effect that the amount of insurance adequate to protect the property could not be obtained in companies regularly admitted to do business in Massachusetts, the Insurance Commissioner may, under R. L., c. 118, § 20, revoke the authority of the corporation to carry on business here, notwithstanding that the contract of reinsurance was made and was to be performed beyond the limits of the Commonwealth.

In your letter of July 1 you desire my opinion whether, upon the facts disclosed in the examination by your department of a foreign fire insurance corporation, you have power to revoke the company's authority to transact business in Massachusetts.

To the Insurance Commissioner.
1904
July 21.

The corporation, which was admitted to Massachusetts in 1891, has, at its general offices in the city of New York, reinsured risks

¹ For a very full and instructive discussion of the origin and history of the veto power, see opinion of Nott, J., in *United States v. Weil et al.*, 29 C. Cls. R. 523.

on Massachusetts property in companies which have not been authorized to do business in Massachusetts, no affidavit having been filed, in accordance with R. L., c. 118, § 83, that the amount of insurance necessary to protect the property could not be procured in admitted companies. In each case the contract of reinsurance was made and was to be performed in New York City.

R. L., c. 118, § 20, provides in part as follows:—

If a company directly or indirectly reinsures a risk taken by it on any property located in this commonwealth in a company not duly authorized to transact business herein, . . . the insurance commissioner may revoke its authority to transact business in this commonwealth.

This statute does not limit such action by the Insurance Commissioner to acts done by the company within this Commonwealth; its intention is to prevent, so far as it may, the insurance of Massachusetts property by companies not under the control or supervision of this Commonwealth. It purports to authorize the Insurance Commissioner to revoke the company's authority, although the ground of revocation is an act done outside this jurisdiction. The question is, whether this statute thus construed is constitutional.

While the Legislature has no right to require an owner of property situated in Massachusetts to insure it only in authorized companies (*Allgeyer v. Louisiana*, 165 U. S. 578), the right of the Legislature to dictate terms upon which a foreign company may reinsure its risks as a condition of remaining here rests upon a different and valid foundation. A person owning property here has a right to insure it in such company as he chooses, provided the forbidden act of insurance takes place outside the jurisdiction. Since the contract of insurance, if made outside the jurisdiction, for the sake of the owner is not to be interfered with, the other party to the contract, the insurance company, is sheltered by the owner's privilege; but in case of reinsurance, neither the insuring company nor the reinsuring company, when not authorized to do business here, is guaranteed by the Constitution the right to make that contract. The owner of the property and his rights are not to be considered, since the

contract of reinsurance is entirely between the two foreign companies, there being no relation between the owner and the reinsuring company.

The State may prohibit foreign insurance companies entirely from doing business within its limits. It may then impose such conditions as it pleases upon the doing of business, and upon failure to perform the conditions it may refuse authority to do business or revoke an authority once given. *Paul v. Virginia*, 8 Wall. 168; *Ducat v. Chicago*, 10 Wall. 410; *Hooper v. California*, 155 U. S. 648; *Manchester Fire Insurance Company v. Herriott*, 91 Fed. 711.

In *Waters-Pierce Oil Company v. Texas*, 177 U. S. 28, a Texas statute provided that every foreign corporation violating its provisions should forfeit its right to do business in Texas. The Attorney-General proceeded against a foreign corporation which was authorized to do business in the State for forfeiture of that right. In the United States Supreme Court the corporation contended that the statute limited its right to make contracts, and took away its property without due process of law. The court sustained the forfeiture which had been declared by the State court, observing: "What right of contracting has it in the State of Texas? This is the only inquiry, and it cannot find an answer in the rights of natural persons." See also *Blake v. McClung*, 172 U. S. 239; *Orient Insurance Company v. Daggs*, 172 U. S. 557.

It is no objection to the exercise by the Insurance Commissioner of the power given him by this statute that his reason for revoking the authority of the company is that the company has done an act outside the jurisdiction which the Commonwealth cannot effectually prohibit by penal laws, having no extra-territorial effect. Since insurance is not interstate commerce, the State may deprive a foreign company of the right to do business within its limits for any reason that it deems proper.

In *Doyle v. Continental Insurance Company*, 94 U. S. 535, the Supreme Court of the United States held that an injunction to restrain the Insurance Commissioner from revoking the license of a foreign insurance company must be denied. In that case the

license was revoked for the reason that the company removed a case from the State to the federal court, in violation of a State statute providing that in case of such removal its license should be cancelled. The company, as a condition of its license, had been required to agree not to remove any case. Though the agreement was void (*Insurance Company v. Morse*, 20 Wall. 445), and a similar statute applying to a corporation or individual having a right to do business in the State would be unconstitutional as denying a right guaranteed by the federal Constitution (see *Barron v. Burnside*, 121 U. S. 186, 199), a majority of the court held that, since a foreign insurance company has no constitutional right to do business within the State, it was justifiable to give the corporation the option either to stay out or to deny itself a federal right.

I therefore conclude that the statute authorizes you to revoke the license of the foreign insurance company for the reasons stated, and that the statute is valid, though indirectly prohibiting acts done outside the State, since under it the corporation had an option to stay out of the State or comply with the statute.

INSURANCE — FRATERNAL BENEFICIARY ASSOCIATION — FOREIGN CORPORATION — ADMISSION TO COMMONWEALTH — MORTUARY ASSESSMENT RATES.

A foreign fraternal beneficiary association which was not doing business in the Commonwealth on May 23, 1901, and which does not at the time of its application have in force mortuary assessment rates not lower than those indicated as necessary by the National Fraternal Congress Mortality Tables, as required by R. L., c. 119, § 13, may not be admitted to carry on business within this Commonwealth.

To the Insurance Commissioner.
1904
July 22.

In your letter of April 27 you request my opinion whether the Supreme Lodge, Ancient Order of United Workmen, a foreign fraternal beneficiary corporation, may be admitted to do business in this Commonwealth.

The Supreme Lodge was incorporated in Kentucky in 1873. In 1878 it entered Massachusetts and established here subordinate

lodges. In 1883 one of these subordinate lodges, called the Grand Lodge, Ancient Order of United Workmen, was incorporated under the Massachusetts laws. Although an independent fraternal beneficiary corporation, the Grand Lodge continued to affiliate with the Supreme Lodge and contribute to its support in a manner afterwards expressly made legal by St. 1899, c. 442, § 15 (R. L., c. 119, § 10). In 1886 the charter of the Supreme Lodge was withdrawn, and the Supreme Lodge continued to exist as a voluntary association until 1899, when it was incorporated under the laws of Texas. It is to-day a Texas corporation.

During the period from 1886 to 1899, while the Supreme Lodge was a foreign voluntary association, the Grand Lodge, the Massachusetts corporation, continued in business in Massachusetts, and is still transacting business here.

The important feature of these dates to be noted is that during the period from 1886 to 1899 the Supreme Lodge was a foreign unincorporated association.

The law regulating the admission of a foreign fraternal beneficiary corporation is R. L., c. 119, § 13: —

No such corporation which was not doing business in this commonwealth on the twenty-third day of May in the year nineteen hundred and one shall hereafter be admitted to do such business in this commonwealth unless it shall have adopted and have in force mortuary assessment rates which are not lower than those then indicated as necessary by the "National Fraternal Congress Mortality Tables."

Two questions arise: —

(1) Was the Supreme Lodge doing business in Massachusetts on May 23, 1901?

(2) If not, has the Supreme Lodge in force mortuary assessment rates not lower than those indicated as necessary by the National Fraternal Congress Mortality Tables?

To discover whether the foreign body as well as the Massachusetts corporation was doing business here on May 23, 1901, it is necessary to look at the history of the statutes relative to such foreign corporations and associations.

St. 1888, c. 429, § 11, provided:—

Fraternal beneficiary corporations, associations or societies organized under the laws of another state, now transacting in this commonwealth business as herein defined, and which now report or which shall report when requested to the insurance department, may continue such business without incorporating under this act, by conforming in other respects to the foregoing provisions and to the requirements of section thirteen of this act.

This section was repeated substantially in St. 1890, c. 341, § 11.

In 1892 a special act (c. 40) was passed, providing as follows:—

Section eleven of chapter four hundred and twenty-nine of the acts of the year eighteen hundred and eighty-eight, as amended by section one of chapter three hundred and forty-one of the acts of the year eighteen hundred and ninety, is hereby amended by striking out, in the first and second lines, the words "associations or societies", and adding to the section at the end thereof the following:— . . . The transaction of the business defined in this act, by any corporation, association, partnership or individuals, unless organized or admitted as provided herein, is forbidden.

Since at the time of the passage of St. 1892, c. 40, the Supreme Lodge was an association and not a corporation, from and after the passage of that act the Supreme Lodge had no right to continue in business in Massachusetts. The right previously existing, of a foreign unincorporated association, thus taken away, was never restored. See St. 1894, c. 367, § 10; St. 1898, c. 474, § 13; St. 1899, c. 442, § 18; St. 1901, c. 422, § 18; R. L., c. 119, § 13.

Since St. 1892, c. 40, destroyed the right of such an association to continue in business in Massachusetts without being admitted according to law, I advise you that you have no authority to admit the Supreme Lodge to Massachusetts now, unless it shall appear that it has adopted and has in force mortuary assessment rates which are not lower than those indicated as necessary by the National Fraternal Congress Mortality Tables. It becomes necessary, therefore, to consider whether its mortuary assessment rates are high enough.

Taking the National Fraternal Congress Mortality Tables and interest at four per cent., which is the same rate used by the Fraternal Congress and by this company in its computations, I find that the level premium required at age twenty is \$10.57; that is, one entering the company at age twenty must pay \$10.57 at the beginning of each year, in order that the company may have on hand \$1,000 with which to pay his benefit certificate when he dies at the time appointed in the mortality table. A portion of this premium goes the first year for current insurance, a larger portion for reserve. To illustrate: suppose one thousand enter at age twenty and remain until death; during the first year a small proportion of them will die; enough money is taken from the premiums of those who live to make up, in addition to the premiums received from those who die, the amount of those losses; the balance goes to reserve. The next year more of each premium goes to pay current mortality, and less to reserve. After many years all the annual premiums will be required to pay the increasing death losses, and, in addition, sums must be taken from the reserve. Finally, the last man of the one thousand dying, there will be exactly \$1,000 left of the reserve to pay his certificate. Obviously, the accumulation of a reserve is necessary to keep the company solvent. Under the section of the statute which I am considering (§ 13), a company must "have in force" rates which are not lower than those indicated as "necessary" by these tables. Necessary for what? This can only mean necessary for keeping the company in a condition of solvency, so that it may meet the losses, assuming that members will die as fast as and no faster than the tables predict. This phrase inevitably implies that the rates must be sufficient to produce a sufficient reserve, if the members die according to the mortality rate of the tables. These rates, moreover, must be kept in force. The company must collect them.

It has been suggested that the statute does not require a fraternal corporation to collect any reserve, that it may continue, since the enactment of this provision (St. 1901, c. 422, § 18), as before, to assess merely for current mortality, the effect of this provision being simply to set a maximum limit upon the assess-

ments which it may call; and my attention is called to the earlier requirement, codified in the same statute as § 7, that such company may collect, in addition to a death fund amounting to three assessments on all the members, an emergency fund not exceeding at any time five per cent. of the aggregate face value of its outstanding certificates. In brief, one section of the chapter, the earlier in original enactment, limits the death fund arbitrarily to a percentage of the face value of the certificates in force, while another section, later in enactment, requires, by its necessary construction, that a death fund be accumulated by a company organized or admitted subsequent to May 23, 1901, large enough to keep the company mathematically solvent, according to the National Fraternal Congress Tables. This being a flat contradiction, I advise that the earlier arbitrary limit of § 7 must yield to the later scientific adjustment of the rates in § 13, and can be applied only to companies organized or admitted before that date.

The annual level premium which a company must collect and hold for death claims at age twenty is, then, \$10.57. This increases each year, until at age fifty-five it is \$40.83.

What are the rates of the Supreme Lodge, Ancient Order of United Workmen, throughout these ages? At age twenty the rate is said to be \$12.60, leaving out of sight the guaranty fund which will be discussed later. At age fifty-five it is said to be \$50.40, and at each intermediate age the rate is said to be greater than the corresponding rate required by the National Fraternal Congress Tables.

But the rates, thus arranged in parallel columns, —

	N. F. C.	A. O. U. W.
Age 20, ...	\$10 57	\$12 60
Age 21, ...	10 87	12 96
Age 55, ...	40 83	50 40
Age 59, ...	50 47	50 40

are not really parallel; they do not stand for the same thing respectively; \$10.57 in the National Fraternal Congress column means that \$10.57 is paid in advance to the company as a yearly premium; \$12.60 in the Ancient Order of United Workmen column means that, if the company sees fit to collect twelve monthly assessments of \$1.05 each, it will have taken from the member during the year \$12.60. But, in fact, the Ancient Order of United Workmen collects only eight or nine of the monthly assessments, so that the rate which it enforces is less than the National Fraternal Congress rate.

It seeks to justify this failure to collect rates equal to those indicated as necessary by the National Fraternal Congress Mortality Tables by pointing out that it gives its members the benefit of the company's gain in mortality over that of the tables by assessing only enough to cover the reserve element of the annual premium and the actual mortality of the year. Instead of collecting the whole premium and returning to each member his share of the company's gain from vitality, in the form of a dividend, as mutual old-line companies are supposed to do, it declares a dividend to its members by failing to assess them for more than is actually needed, in addition to the reserve.

There is no authority in the fraternal law for paying dividends to members in any mode. Formerly, such corporation would assess only from hand to mouth, relying on "new blood" to support the business. The inevitable result was the freezing out of old members, or insolvency, — often both. There was no occasion for dividends, and none were authorized. Indeed, there is an express provision that the whole benefit fund shall be used only for the payment of death and disability benefits (§ 7). Now, a new company or a newly admitted company is required to have in force rates based on these mortality tables. In order to give members the benefit of a gain in actual over predicted mortality, that provision of § 7 must be changed by legislation.

A similar criticism applies to the classified rates of the Supreme Lodge, under which members are insured on the renewable term plan, instead of the level plan, paying a higher rate during each successive term of five years until they reach the

age of thirty-five, when, if they remain in the order, they are required to pay the level rate of \$50.40 thereafter. Under this system a man of twenty pays a maximum of \$6 in assessments during the year; a man of fifty-four a maximum of \$18; a man of fifty-five a maximum of \$50.40. While these amounts are higher than the National Fraternal Congress rates for the corresponding ages, they are not rates which are enforced.

Thus far I have discussed only the rates up to age fifty-five. Thereafter the so-called rate of the Supreme Lodge continues \$50.40 until the end of the table, while the rate required by the National Fraternal Congress Mortality Tables increases with rapidity; so that, while one who enters at sixty must pay a level rate of \$53.34, one entering at sixty-five must pay \$72.32, and at seventy \$97.91.

The company argues that this makes no difference, since it has in force a by-law prohibiting the admission of members above the age of fifty-five. But the members who are insured by the company are *at present* of all ages, and only a few of them since their entry into the order have paid the rates necessary to keep the order solvent under the National Fraternal Congress Tables. That the rates may be not lower than those indicated as necessary by the tables, each member must pay in, from the time the law takes effect, enough to create the reserve required to carry out his contract of insurance. It is not sufficient that the company makes its rates high enough for those it admits for the future, while carrying old men whose present rates are not high enough to insure the fulfilment of their contracts. At the time of changing from the old way to the new the company must treat those who entered under the old-fashioned system and have paid only for their current insurance as new members, and charge them the rates suitable to their ages when the change is made. Those members are like persons insured in an old-line company, who carry yearly renewable term insurance, whereby they pay each year the current cost of insurance; at any given time they must pay the rate of attained age, not the rate of age of entry. Whether they are given in exchange a step-rate or a level rate, it must be that applicable to their attained age.

If at and since the age of entry the members had been paying National Fraternal Congress rates, there would of course be no occasion for raising their rates now. But, as they have only been paying current insurance, they must begin paying the National Fraternal Congress rates fitting the ages which they have attained at the time the law goes into effect upon the company.

I advise you, therefore, that, even were the company to begin now to *collect* rates equal to the National Fraternal Congress rates from all members below the age of fifty-nine, the age when the National Fraternal Congress rate begins to exceed the so-called Ancient Order of United Workmen rate, it could not be admitted to do such business in this Commonwealth.

In this connection should be noted the contention of the Supreme Lodge that its "guaranty fund" obviates the need of collecting from all members the necessary rates. The company has calculated the deficiency arising from the cause just discussed, and has established to meet it an additional rate which it assesses upon the members under the age of fifty-five. At the time of each assessment of the beneficiary rate it makes an additional assessment, which goes to the guaranty fund. The present value of the guaranty assessments which may be laid, if all the members stay in the order and pay them, is said to be in excess of the present value of the deficiencies. Thus the company increases the premiums of the young to make up for the lack of sufficient premiums from the old.

The efficacy of this method depends upon the persistence of those who are to pay the extra rates. Its object will be defeated by the lapsing of members under the age of fifty-five. Obviously, the persistent members will be those whose rates are paid in part by others, while those who are expected to bear their brothers' burdens may not remain and "cheerfully pay," as the company suggests that they are doing at present. This method is therefore open to the same objections as the old-fashioned method of collecting a dollar all around when a member dies; it depends for success upon the constant support of young men.

I advise you that collection of rates from one class of members to pay the cost of insuring another class is not equivalent to the enforcement of rates not lower than those indicated as necessary by the National Fraternal Congress Mortality Tables.

The problem of adjusting the finances of an existing fraternal company so that it may have a reasonable chance of keeping out of the hands of a receiver, it having members of all ages, of whom the older ones cannot be expected to pay according to their attained ages, is, indeed, difficult. It is a problem which the Legislature has not attempted to solve for the companies now doing business in Massachusetts. But in this statute it has shown its determination that the problem be not increased in size by admitting to do business here foreign companies which are not on their own feet, whose members are not paying, each for himself, rates which are adequate to keep their insurance good according to the mortality rate assumed in the National Fraternal Congress Tables.

STATUTE — CONSTRUCTION OF GENERAL AND PARTICULAR —
REGULATION OF FISHERIES IN SWAN POND RIVER.

St. 1895, c. 203, § 1, authorizing the selectmen of the town of Dennis to "prescribe the times, places and manner of taking herring or alewives, perch, salmon, eels and trout in Swan Pond River" and certain tributaries thereof, does not vest in the selectmen of Dennis any power to make rules or regulations which are inconsistent with the general statutes relating to fisheries, whether or not such statutes were enacted after the passage of St. 1895, c. 203.

To the Com-
missioners on
Fisheries and
Game.
1904
July 29.

You desire my opinion upon the question whether St. 1895, c. 203, entitled "An Act to regulate the fisheries in Swan Pond River," and providing that the selectmen of the town of Dennis may prescribe the times, places and manner of taking herring or alewives, perch, salmon, eels and trout in Swan Pond River, permits the selectmen to authorize the use of implements for taking such fish forbidden by the general laws.

St. 1904, c. 308, provides:—

Whoever draws, sets, stretches or uses a drag net, set net, purse net, seine or trawl, or whoever sets or uses more than ten hooks for fishing, in any pond, or aids in so doing, shall be punished by a fine of not less than twenty nor more than fifty dollars. The provisions of this section

shall not affect the rights of riparian proprietors of ponds mentioned in section twenty-three or the corporate rights of any fishing company.

St. 1895, c. 203, § 1, is as follows:—

The selectmen of the town of Dennis, or a majority of them, shall annually, on or before the twentieth day of April in each year, prescribe the times, places and manner of taking herring or alewives, perch, salmon, eels and trout in Swan Pond river, at the mouth thereof or in the ponds and streams connected therewith, and they may appoint some suitable person or persons to take the same, and shall fix the compensation to be paid therefor; or may grant permits to suitable persons, being inhabitants of said town, to catch any of said fish in the said river or the ponds and streams connected therewith, and fix the compensation to be paid to said town for such permits, and shall determine the quantity of said fish which each family in said town shall receive from such catches, and establish the price therefor; and may sell, at auction or otherwise, the right of fishing in said river and its waters to one or more persons, for a term of not more than five years at one sale, upon such terms and conditions as the said town or said selectmen may direct: *provided*, that nothing in this section shall be construed to prevent any person, being an inhabitant of said town, from taking fish with natural or artificially baited hook and hand line, under such regulations as said selectmen may prescribe.

Section 4 provides the penalty for taking fish in the designated * waters "at any time or place or in any manner other than may be allowed by said selectmen."

Section 5 provides that if any boat, vessel or craft is found with more fish on board than is allowed by the selectmen, "or if any person or persons with any such vessel, boat or craft, shall be detected in taking or in attempting to take any of said fish in any manner different from that prescribed by said selectmen, or with seines, nets or with other instruments of a kind or size different from that established by said selectmen," the selectmen may seize the vessel, in order that it may be attached and made answerable for the fines. The selectmen of Dennis allege that under this statute they are exempted from the operation of all general laws regulating fishing throughout the Commonwealth.

I am of opinion that c. 203 of the Acts of 1895 did not vest in the selectmen of the town of Dennis any absolute or irrevocable authority with relation to the fisheries, nor authorize the making

of rules and regulations in contravention of the general laws governing fisheries throughout the Commonwealth.

Under the present law it appears that the use of seines or nets in ponds is throughout the Commonwealth illegal and forbidden; and it cannot be that the selectmen of Dennis may, under any assumed authority of the act of 1895 above stated, authorize fishing in a manner prohibited by the Revised Laws in the waters of Swan Pond River, if such waters are in fact within the prohibition of that law. The special power given to the selectmen goes no further than to permit them to make such local rules and regulations as are not inconsistent with the general statutes, and the Legislature in enacting the special law did not intend to then or thenceforward divest itself of authority over the waters specified in the act; on the contrary, I am of opinion that it was contemplated that further legislation might be had without control or limitation by reason of the special act.

It would follow, in my opinion, that subsequent legislation applicable to the subject-matter would regulate, modify or control the provisions of the earlier statute, and the authority of the town thereafter could be executed only within and consistently with such general laws as should be from time to time in effect. The rights conferred by St. 1895, c. 203, are not abrogated in their entirety by the provisions of the Revised Laws, but the authority under the earlier act must be subject to the provisions of the general laws.

STATE BOARD OF PUBLICATION — STATISTICS — APPROVAL OF PUBLICATION.

Statistics, or figures, specifically required by law to be set forth and published in the reports of the officers or heads of departments of the Commonwealth, are not subject to the jurisdiction of the State Board of Publication, as defined by St. 1904, c. 388, § 2, which provides that boards, commissions and heads of departments shall not incorporate any statistics into the documents relating to their several departments without first securing the approval of such Board.

To the State
Board of
Publication.
1904
September 21.

The State Board of Publication in substance desires to know whether specific statistics required to be set forth and published in the reports of officials or departments of the Commonwealth,

under the provisions of general or special laws, are now within the supervisory jurisdiction of the State Board of Publication, as defined by § 2 of c. 388 of the Acts of 1904, which section is as follows:—

Boards, commissions and heads of departments having charge of preparing and printing documents relating to their various departments shall not incorporate therein any statistics unless the same shall be approved by the state board of publication.

I am of opinion that this section must be restricted in its application to those statistics which are not specifically required by legislation to be embodied in the report under consideration. And I am further of opinion that where there is a specific statutory requirement for the publication in the report of any commission or official of particular statistics, such statistics must be published, and the duty of publication is imposed upon the official or commission by statute. In my judgment, the statute of 1904 above referred to cannot and ought not to be so construed as by indirection to modify, alter or remove a specific official duty imposed by law upon any officer or servant of the Commonwealth.

It seems to me, therefore, perfectly clear that the jurisdiction of the Board of Publication does not extend so far as to authorize or permit that Board to restrict or prohibit the publication of specific statistics required by pre-existing law. If the Board of Publication have any jurisdiction in such premises, it must be limited to an examination of such statistics, and to the determination whether or not they comply with the provisions of law relating thereto. The Board might, if it appeared that the statistics offered for publication exceeded the legal requirement, reduce them to the limit of such requirement; but it is indeed doubtful whether even this power is vested in the Board of Publication, since their authority in general is supervisory, and clearly not intended to limit or control those publications which the law has otherwise specifically required.

CLERK OF THE COURTS — VACANCY — CLERK OF THE SUPERIOR
COURT FOR THE COUNTY OF SUFFOLK.

The phrase "clerk of the courts," in R. L., c. 11, § 277, which provides that in case of a vacancy in the office of clerk of the courts the Governor shall cause precepts to be issued for an election to fill such vacancy at the next annual State election for which precepts can be seasonably issued, extends to and includes the office of clerk of the Superior Court for the county of Suffolk; and it is therefore the duty of the Governor, upon proper representation that a vacancy in such office exists, to issue his precept for an election to fill such vacancy at the next annual State election for which such precept may be seasonably issued.

To the
Governor.
1904
September 27.

I have the honor to acknowledge Your Excellency's communication under date of September 12, 1904, in which you advise me that you are informed that the Secretary of the Commonwealth has received official notification from the Superior Court for the county of Suffolk of the death of Clerk Joseph A. Willard, and that, in accordance with the statute, an appointment has been made by the judges to fill the vacancy. You further instruct me that "the question has arisen as to whether or not the appointment made by the judges under the statute is until such time as an election can be held to fill the vacancy under a precept issued by the Governor, or whether the appointee fills the vacancy for the unexpired term for which the late Mr. Willard was elected." Your Excellency further states that you have been requested to issue a precept for an election, and that you desire my opinion as to whether or not under the statute the duty so to do devolves upon you.

It is a fundamental principle that when a vacancy exists in a public office a person appointed to fill that vacancy will, in the absence of express or necessarily implied provisions to the contrary, hold such office during the unexpired term of the original incumbent. The person appointed to the vacancy in the office of clerk of the Superior Court, therefore, will continue in office until the qualification of his successor after the annual State election in 1906, unless the Legislature has otherwise provided. See R. L., c. 11, § 318:—

At the annual state election in the year nineteen hundred and six, and in every fifth year thereafter, a clerk of the supreme judicial court for the county of Suffolk and two clerks of the superior court, one for civil

and one for criminal business, shall be chosen by the voters in said county; and, by the voters in each of the other counties, a clerk of the courts who shall act as clerk of the supreme judicial court, of the superior court and of the county commissioners.

Since the adoption in 1855 of the Nineteenth Amendment of the Massachusetts Constitution, by virtue of a law enacted in 1856 (St. 1856, c. 173), clerks of the county courts who, prior to that act, had been appointed by the justices, have been elected at the annual State elections for periods of five years. The statute provides for the filling of vacancies, in general, by election at the annual State election following the vacancy. Its present form is as follows (R. L., c. 11, § 277):—

Upon a failure to choose a district attorney, clerk of the courts, register of probate and insolvency or sheriff, the governor shall cause precepts to be issued to the proper officers, directing them to call meetings of the voters on the day appointed therein, for the election of such officer.

Upon a vacancy by removal or otherwise in any of the above-named offices, he shall in like manner cause precepts to be issued for an election to fill such vacancy at the next annual state election for which precepts can be seasonably issued.

. . . Upon a vacancy in the office of clerk of the courts in any county, or of the clerk of the supreme judicial court in the county of Suffolk, the justices of said court may appoint a clerk who shall hold the office until a clerk is elected and qualified.

Upon a vacancy in the office of a clerk of the superior court in the county of Suffolk, the justices of said court may appoint a clerk.

The first question is, whether in the last two clauses of this section a distinction is made in the manner of filling the vacancy in the office of the clerk of the Superior Court and the manner of filling a vacancy in the office of clerk of the Supreme Judicial Court in Suffolk County. This part of the section appears in the Public Statutes as follows (P. S., c. 159, § 7):—

If a vacancy occurs in the office of clerk of the courts in any county, or of the clerk of the supreme judicial court in the county of Suffolk, the justices of said court or a majority of them may appoint a clerk, who shall hold the office until the next annual election, or until another is elected or appointed in his stead. Upon a vacancy in the county of Suffolk in the office of a clerk of the superior court, the justices of that court shall in like manner appoint a clerk for a similar term.

In my opinion there is no intention manifested in the compilation of this statute into the section of the Revised Laws above quoted to change the provisions of the Public Statutes. A vacancy in the office of a clerk of the Superior Court is to be filled in the same manner as a vacancy in the office of clerk of the Supreme Judicial Court in Suffolk County. See also St. 1890, c. 423, §§ 190, 200; St. 1893, c. 417, § 218; St. 1898, c. 548, § 315.

The remaining question is, whether the clerk of the Superior Court of Suffolk County for civil business is a "clerk of the courts," within the fair meaning of this statute. If not, there is no authority for issuing a precept for an election to fill a vacancy in his office, and the vacancy must be filled at the next quinquennial election.

In each county other than Suffolk there is one officer who is clerk of both the Supreme Judicial Court and the Superior Court. He has always been designated as "clerk of the courts." In Suffolk County there are three clerks, one for each of the three county courts; each is clerk of one of the courts and is a clerk of the courts; no one of them is, to speak with the utmost strictness, "clerk of the courts."

It may be argued that the Legislature has distinguished between the ancient and well-defined office of "clerk of the courts" and the special offices in Suffolk County of more restricted jurisdiction and authority, namely, the clerk of the Supreme Judicial Court and the two clerks, the one upon the civil and the other upon the criminal side of the Superior Court; that in the former case a specific provision has been made for a special election, while in the latter case such specific provision has been omitted.

Since, however, the phraseology of the Revised Laws is open to different meanings, and no reason can be suggested why the Legislature should have intended such a distinction in the manner of filling vacancies in Suffolk County, it is proper to trace the history of this statute, in order to discover what the intention of the Legislature is.

Throughout the several codifications of the statute, including the General Statutes of 1860, the same ambiguity of language is present; but in the original enactment of 1856 the meaning is

clear that a vacancy in Suffolk County is to be filled exactly as in the other counties.

St. 1856, c. 173: —

SECT. 2. At the annual election in November, in the year one thousand eight hundred and fifty-six, and at the annual election in November of every fifth year thereafter, the legal voters of the several cities and towns in each county, excepting in the county of Suffolk, shall choose by ballot for their respective counties, a clerk, who shall act as clerk of the supreme judicial court, and the court of common pleas, within and for the county for which he shall be chosen; and at the same time the legal voters of the county of Suffolk shall choose by ballot for said county of Suffolk, a clerk of the supreme judicial court, a clerk of the superior court, and a clerk of the municipal court of said county.

SECT. 9. In case a vacancy shall, from any cause, occur in the office of any of the clerks of courts hereinbefore mentioned, the judges of the said several courts, or a majority of the same, may appoint a suitable person to fill such office, who shall hold the same until the annual election in November next thereafter, or until another is chosen or appointed in his stead; and at said annual election next thereafter, an election by ballot shall be had, to fill said office for such unexpired term as may exist, in the same manner as is hereinbefore provided for the election of said clerks.

These sections, together with the amendment of St. 1859, c. 196, § 9, making a civil and a criminal division of the Superior Court in Suffolk County, were codified in the General Statutes of 1860, as follows (Gen. St., c. 10): —

SECT. 3. In the year eighteen hundred and sixty-one and every fifth year thereafter, there shall be elected by the voters in the county of Suffolk, a clerk of the supreme judicial court for said county, and two clerks of the superior court for said county, one for the civil, and one for the criminal, business, and by the voters in each of the other counties a clerk of the courts for the county, who shall act as clerk of the supreme judicial court, the superior court, and the county commissioners. Such clerks shall hold their offices for five years from the first Wednesday of January following their election, unless sooner removed as provided by law.

SECT. 10. If on the days aforesaid there is a failure to elect a district-attorney, clerk of the courts, register of probate and insolvency, sheriff,

or commissioner of insolvency, in any district or county, the governor shall by proclamation declare such failure and order a new election to be had on such day as he shall appoint, and shall continue so to order such elections until a choice is effected.

SECT. 13. If a person elected to either of the offices mentioned in section ten is removed therefrom, or otherwise vacates the same, an election to fill such office for the remainder of his term shall be ordered by the governor, and shall be had on the Tuesday next after the first Monday of November.

The difficulty arises from the fact that § 13 refers to a vacancy in one of the offices mentioned in § 10, in which the phrase is "clerk of the courts," instead of § 3, which enumerates specifically the three clerks in Suffolk County as well as the clerks in the other counties. This reference to a vacancy in the office of a clerk of the courts was not, in my opinion, an intentional exclusion of the clerks of the Suffolk County courts. By using the general phrase "clerk of the courts" the compilers do not intend thus to change the provisions of the statute of 1856. My opinion is strengthened by the fact that the commissioners who compiled this revision, in their note upon this chapter, commented upon a change which they made in § 13, and were silent as to any alteration of meaning in this respect.

Their note is as follows:—

Sect. 13. The act of 1856, chapter 173, provides for appointments to fill vacancies, and that the persons appointed shall hold until the annual election in November next thereafter, or until another is chosen or appointed. It then provides that an election shall be had to fill the vacancy at "the said annual election thereafter." As a vacancy may occur so near the time of the annual election that it would not generally be known, the commissioners have provided that the vacancy shall be filled at the time of the annual election without confining it to the next one, and that warrants therefor shall be issued.

I therefore advise Your Excellency that it is your duty, under the statutes, to cause a precept to be issued for an election to fill this vacancy at the next annual State election for which such precept can be seasonably issued.

CHARLES RIVER BASIN COMMISSION — REMOVAL OF CRAIGIE BRIDGE — TAKING.

Under the provisions of St. 1903, c. 465, providing that the Charles River dam, the construction of which is authorized thereby, "shall occupy substantially the site of the present Craigie bridge, which shall be removed by the commission," the Charles River Basin Commission is not required to make a taking of the existing bridge before proceeding with its removal.

Your letter of September 23 requests my opinion as to whether or not it will be necessary for you to make a taking of Craigie bridge across the Charles River, in order to carry out the work which you are authorized to do by St. 1903, c. 465. Section 3 of that act provides that the Charles River dam "shall occupy substantially the site of the present Craigie bridge, which shall be removed by the commission." Craigie bridge is a portion of the public highway, and as it now exists was built by commissioners under St. 1873, c. 199, the expense thereof being paid equally by the cities of Boston and Cambridge. The expense of maintenance is also shared equally by those cities. St. 1898, c. 467, § 14.

To the Charles
River Basin
Commission.
1904
October 8.

St. 1903, c. 465, § 3, provides that the Charles River dam shall be not less than one hundred feet in width at water level, and "a part thereof shall be a highway and the remainder thereof shall be a highway, or park or parkway, as the commission shall determine. . . . The part of the dam used as a highway shall be maintained and operated in the same manner as the Cambridge bridge, and under the laws now or hereafter in force relating to said bridge." In other words, the part of the dam used as a highway is to be maintained and operated by a board of two commissioners, one appointed by the mayor of the city of Boston and one by the mayor of the city of Cambridge, exactly as the present Craigie bridge is maintained and operated under St. 1898, c. 467, § 14. By the act of 1903 the Legislature temporarily took the control of Craigie bridge out of the hands of the board of bridge commissioners and gave it into the hands of your commission, for the purpose of removing it and of building a new bridge in its place. By § 9 the expense of that work will be borne by the two cities, and the control over the new bridge, when you

have finished it, will be vested in the board of bridge commissioners. A similar plan was adopted for rebuilding the West Boston bridge by St. 1898, c. 467. The rights of the two cities are the same as though the Legislature had authorized the board of commissioners having control of the bridge to rebuild it at the expense of the cities, in which case no taking would be necessary. The present structure was built in that way, and the constitutionality of legislation of that character has been for a long time recognized. *Carter v. Cambridge & Brookline Bridge Proprietors*, 104 Mass. 236.

I am of opinion, therefore, that your commission should not make a taking of the present Craigie bridge, but should proceed to remove it and rebuild the highway across the river, in accordance with the provisions of your enabling act.

DOMESTIC ANIMALS — CONTAGIOUS DISEASES OF CATTLE — CATTLE BUREAU.

The powers vested under the provisions of R. L., c. 90, as amended by St. 1902, c. 116, in the officers of the Cattle Bureau with relation to contagious diseases of cattle are not to be extended by implication to contagious diseases other than those enumerated in R. L., c. 90, § 4.

To the Chief
of the Cattle
Bureau of the
State Board of
Agriculture.
1904
October 10.

Your letter of July 19 calls for my opinion upon the question whether a disease of the eye, known as *enzootic ophthalmia*, which has attacked certain cattle in the town of Westborough, is a contagious disease within the meaning of the definition of that term contained in R. L., c. 90, § 4. The disease in question is stated to be apparently contagious, but not dangerous to the animals attacked by it or to the health of persons who may be brought into contact with it. Upon these facts you inquire specifically whether there is any legal authority in the chapter above referred to, as amended by St. 1902, c. 116, § 3, for isolating and forbidding the sale of animals from herds where such disease exists, until the danger of contagion is over.

Assuming that the disease in question is in no respect dangerous to mankind, I am of opinion that you have no jurisdic-

tion in the premises. The evident purpose of the statute was to protect and preserve the health of persons purchasing the several products derived from domestic cattle; and it was not intended to relieve the owner of cattle from the responsibility of their care and maintenance or to preserve the health of the cattle themselves. The diseases specifically enumerated in § 28 of c. 90 of the Revised Laws appear to be contagious diseases which affect the products derived from cattle, either milk or meat, and through them the health and safety of the persons by whom they are consumed. The powers vested in the officers of the Cattle Bureau, in the case of the contagious diseases enumerated in the statute, are very broad, and for that reason are not, in my opinion, to be extended by implication to diseases other than those specifically mentioned in § 28.

PERSON INFECTED WITH CONTAGIOUS DISEASE — TRANSPORTATION BEYOND THE BORDERS OF THE COMMONWEALTH FOR CARE AND TREATMENT.

There is no existing provision of law by virtue of which a person found within this Commonwealth suffering with a contagious or infectious disease may, without his consent, be transported beyond the borders of the Commonwealth, to be there confined and treated for such disease.

You seek my opinion in behalf of your Board by an inquiry as follows: Whether under any existing law of the Commonwealth there is authority by virtue of which a person found within this Commonwealth suffering with a contagious or infectious disease known as leprosy may be transported, without his consent, beyond the borders of this Commonwealth, to be there confined and treated for such disease.

To the
Trustees of the
State Hospital
and State
Farm.
1904
October 14.

There is no provision of statute which in terms authorizes such transportation, confinement and treatment. R. L., c. 85, §§ 23 and 24, provide for the transportation of paupers to any other State, or to any place beyond the sea "where they belong." This, however, is a different matter from the deportation for the purpose of confinement and treatment, under the control of officers of this Commonwealth.

R. L., c. 75, § 46, as amended by Acts of 1902, c. 206, § 2, provides for the removal of persons infected with contagious disease in the following language:—

A magistrate authorized to issue warrants in criminal cases may issue a warrant directed to the sheriff of the county or his deputy, or to any constable or police officer, requiring them under the direction of the board to remove any person who is infected with contagious disease, or to impress and take up convenient houses, lodging, nurses, attendants and other necessities. The removal authorized by this section may be made to any hospital in an adjoining city or town established for the reception of persons having smallpox or other disease dangerous to the public health, provided the assent of the board of health of the city or town to which such removal is to be made shall first have been obtained.

Control over inmates of the State Hospital is conferred upon the trustees of such hospital by R. L., c. 85, § 18.

The trustees of the state hospital shall have and exercise the same powers relative to pauper inmates and their property as towns and overseers of the poor have relative to paupers supported or relieved by them.

The power of overseers of the poor relative to the relief and support of paupers is fixed in part by R. L., c. 81, § 2.

The overseers of the poor shall have the care and oversight of all such poor and indigent persons so long as they remain at the charge of their respective cities or towns, and shall see that they are suitably relieved, supported and employed, either in the workhouse or almshouse, or in such other manner as the city or town directs, or otherwise at the discretion of said overseers. They may remove to the almshouse such children as are suffering destitution from extreme neglect of dissolute or intemperate parents or guardians, except as hereinafter provided.

This statute does not give overseers of the poor power to remove from the Commonwealth paupers having settlements in the Commonwealth without their consent (*Westfield v. Southwick*, 17 Pick. 68; *Deerfield v. Greenfield*, 1 Gray, 514; see also *Smith v. Peabody*, 106 Mass. 262), and the same limitation must attach to the powers of the trustees of the State Hospital.

There is, moreover, one general principle of interpretation which disposes of the whole question. In the absence of express

words or distinct implications, the presumption is that statutes have no extraterritorial effect. And this is true even in those cases where it would be in the power of the Legislature to give to statutes such an effect.

As to whether it would be in the power of the Legislature to provide for the removal from the Commonwealth, and the confinement and treatment without the Commonwealth, of a person afflicted with leprosy, who is unwilling to be removed, I express no opinion. It appears, however, that neither by express words nor by distinct implication do the statutes above quoted authorize such removal, confinement and treatment, and that consequently, according to the principles stated, the field for the exercise of the powers conferred is limited by the territorial boundaries of the Commonwealth.

INSURANCE — FIRE INSURANCE — MASSACHUSETTS STANDARD
POLICY — MODIFICATION — “RIDERS” — “BINDING SLIPS”
— INSURANCE COMMISSIONER — DUTIES.

R. L., c. 118, § 60, does not forbid the making of a special contract inconsistent with the terms of the standard form of fire insurance policy therein contained, and in cl. 7 expressly provides for such modification of the standard form as the parties themselves may choose to make; it follows, therefore, that a separate slip or “rider,” complying with the provisions of statute applicable thereto, may provide for cancellation upon less than the ten days’ notice required by the standard form.

A fire insurance company is not required to make temporary insurance by means of “binding slips,” by which an agent is authorized to cover property with insurance from the moment of application until the applicant either receives his policy or is notified of the rejection of his risk; and such insurance may be terminated in any manner agreed upon by the parties.

The Insurance Commissioner is not required to pass upon or consider questions relating to the form or contents of the “binding slips” above mentioned.

In your letter of September 14 you ask various questions as to the right of a fire insurance company doing business in Massachusetts to provide for the cancellation of its contracts of insurance upon Massachusetts property, in a manner other than that prescribed by the standard form of policy contained in § 60 of c. 118 of the Revised Laws.

To the Insurance Commissioner.
1904
October 31.

No fire insurance company shall issue fire insurance policies on property in this commonwealth, other than those of the standard form herein set forth, except as follows:

Seventh, A company may write upon the margin or across the face of a policy, or write, or print in type not smaller than long primer, upon separate slips or riders to be attached thereto, provisions adding to or modifying those contained in the standard form; and all such slips, riders and provisions must be signed by the officers or agent of the company so using them.

The language of the standard form in respect to cancellation is as follows:—

This policy may be *cancelled* at any time at the request of the insured, who shall thereupon be entitled to a return of the portion of the above premium remaining, after deducting the customary monthly short rates for the time this policy shall have been in force. The company also reserves the right, after giving written notice to the insured, and to any mortgagee to whom this policy is made payable, and tendering to the insured a ratable proportion of the premium, to cancel this policy as to all risks subsequent to the expiration of ten days from such notice, and no mortgagee shall then have the right to recover as to such risks.

You ask: "Would it be lawful for a company to avail itself of the privilege granted by the 'Seventh' clause of § 60, c. 118 of the Revised Laws, by using 'separate slips or riders' amending the time allowed for the cancellation of a policy to a shorter period than the stated 'ten days'?"

The Legislature has not attempted to make the provisions of the standard form compulsory upon insurer or insured, nor to make such form the sole permissible form of contract. Section 60, above quoted, does not forbid the making of a special contract embodying terms inconsistent with the terms contained in the standard form; indeed, it provides for such modifications of the standard form as the parties may choose to make (cl. Seventh, quoted above). The apparent purpose of the Legislature was to establish an approved form of contract, upon which the insured might confidently rely without the necessity of considering special stipulations which might be obscure or of doubtful import as to the obligations or limitations of the contract. I answer the above question, therefore, in the affirm-

ative. A rider complying with the provisions of the statute relating thereto may permit of a cancellation upon less than the ten days' notice required by the standard form.

Your remaining questions refer to the "binding slips" used by fire insurance companies, by means of which the agent is authorized to cover property with insurance from the moment of application until the company accepts the risk and issues a policy, or rejects the risk and notifies the applicant of its rejection. You ask in varying forms whether such temporary insurance may be terminated by less than ten days' notice to the applicant.

"If a binder is issued or given by an authorized company or agent, which binder stipulates that it may be cancelled or revoked by the party issuing or granting the same, at a less time than the 'ten days' fixed by law, would such act constitute a violation of law, or, if not an actual violation, would the company have a legal right to abrogate or abridge the legal rights which are secured to the insured by the enactment or conditions of the 'standard' form of policy?"

"Could a binder as described as above be considered as legal, provided the ten days' allowance be *waived* by the agreement of both parties, assurer and assured?"

The universal custom of covering property while the insurance company is determining whether to issue a policy or not is convenient, and, indeed, a practical necessity in business; but no law compels the company to make this preliminary agreement, and if it be made, no law prescribes what its terms must be. It is not even required to be in writing. Since there is no legal obligation upon the company to make temporary insurance even for a moment, the company may "bind" such insurance for as long or as short a time as the parties may agree upon. You have, therefore, no duty to see to the form of these binding slips.

I answer your questions, specifically, as follows: The act of giving a binding slip, providing that the temporary contract evidenced by it may be terminated by notice within less than ten days, is not a violation of law. The law, as I have stated above, does not forbid the making of terms inconsistent with those of the standard policy.

I next consider the following question: "Does the giving of a parole agreement, or the issuance of a binder, constitute, theoretically at least, a contract, to be governed by the terms and agreements as fixed by the 'standard form of policy' herein referred to?"

If the binding slip does not provide for its own termination, the question whether the insurance contract evidenced by it may be cancelled on reasonable notice, or whether, since the applicant and the company have made no inconsistent agreements, his property is insured pending the issuance of the policy according to the terms of the standard form, is one of great interest, upon which the decisions are not in accord. See *Lipman v. Niagara Fire Ins. Co.*, 121 N. Y. 454; *Karelsen v. Sun Fire Office*, 122 N. Y. 545; *Hicks v. British Amer. Ass. Co.*, 162 N. Y. 284; *Campbell v. Amer. Fire Ins. Co.*, 73 Wis. 100; *Baile v. St. Joseph F. & M. Ins. Co.*, 73 Mo. 371; *Neb., etc., Ins. Co. v. Seivers*, 27 Neb. 541. This interesting question, however, in no wise concerns your official duty.

Lastly: "Can a parole agreement or binder which by its terms fixes the time at which it is to remain in force at a longer term than ten days be cancelled by the company without giving the insured the ten days' notice required by the 'standard form'?"

The question whether a binding slip purporting to cover for thirty days may be cancelled upon notice, and, if so, upon what notice, is also one which concerns only the parties to the contract.

COMMITMENT — PERSON COMMITTED TO WORKHOUSE — LABOR.

The word "commitment," as used in R. L., c. 30, § 21, providing that "every person who has been committed to a workhouse shall, if able to work, be kept diligently employed in labor during the term of his commitment," is to be broadly interpreted; and such provision is applicable not only to persons committed to a workhouse by a court, but also to persons placed therein subject to the care and oversight of overseers of the poor, and without a technical commitment.

To the State
Board of
Charity.
1904
November 21.

You request the opinion of the Attorney-General as to whether the words "every person who has been committed to a workhouse," in § 21 of c. 30 of the Revised Laws, apply to all of the several classes of "persons" mentioned in § 1 of the same chapter.

R. L., c. 30, § 1, provides: —

A city or town may erect or provide a workhouse or almshouse for the employment and support of indigent persons maintained by or receiving alms from it; of persons who, being able to work and not having estate or means otherwise to maintain themselves, refuse or neglect to work; of persons who live a dissolute, vagrant life and exercise no ordinary calling or lawful business; of persons who spend their time and property in public houses to the neglect of their proper business or who, by otherwise misspending their earnings, are likely to become chargeable to the city or town; and of other persons sent thereto under any provisions of law.

Section 21 provides: —

Every person who has been committed to a workhouse shall, if able to work, be kept diligently employed in labor during the term of his commitment. If he is idle and does not perform such reasonable task as is assigned, or if he is stubborn and disorderly, he shall be punished according to the orders and regulations established by the directors.

The inmates of workhouses are of two classes: first, those persons who are committed thereto by order of court (R. L., c. 208, § 30; c. 212, §§ 39, 46, 54, 55, 59); second, those who are supported therein as paupers under the care of overseers of the poor, but who have not been committed by an order of court (R. L., c. 81, § 2). Many of the persons enumerated in R. L., c. 30, § 1, above quoted, are included within the second class. It therefore becomes important to determine whether the words "commitment" and "committed," in R. L., c. 30, § 21, are to be interpreted narrowly, as meaning commitment by order of court; for, if they are so to be interpreted, it follows that certain persons enumerated in R. L., c. 30, § 1, namely, those within the second class above indicated, are exempt from the provisions of § 21.

I am of opinion, however, that the words are not to be so narrowly interpreted. "Commitment" and "committed" do not necessarily have technical meanings. See *Cumington v. Wareham*, 9 Cush. 585; *Commonwealth v. Barker*, 133 Mass. 399, and statutes therein construed. In defining them reference may be had to the earlier statutes, for words in an act are to be given the same meaning which they had in earlier acts *in pari materia*, in the absence of anything to show a contrary intent.

Reiche v. Smythe, 13 Wall. 162; *Greenleaf v. Goodrich*, 101 U. S. 281, *semble*.

In the section of the original workhouse statute, in which the provisions of R. L., c. 30, § 21, appear, the words "committed" and "commitment" were not used in a technical sense, but were applied to the sending of persons to the workhouse by overseers of the poor.

Province Laws, 1743-44, c. 12, § 11, provided:—

That no town shall be at charge for the support or relief of any person committed to said house, who was not sent thither by the overseers belonging to such town; nor any person orderly committed to it shall be discharged from it but by the overseers by whom he was committed, or by the overseers, at a general meeting, or otherwise by the justices of the court of general sessions of the peace, in the same county, upon application to them made for that purpose; and every person so committed, if fit and able to work, shall be held and kept stric[k]tly and dil[ig]ently [i] [e]mployed in labour during his or her abode there; and in case they be idle, and shall not duly perform such task or stint as shall be reasonably assign'd them, or shall be stubborn and disorderly, shall be punish[e]d according to the orders that shall be made for the ruling, governing, and punishing of the persons there to be committed, not repugnant to the laws of this province.

The same statute provided that the overseers in any town "be and they are hereby directed and empowered to commit to such house . . . any person or persons . . . that hereafter in this act are declared liable to be sent thither." The persons so declared liable to be sent to the workhouse were enumerated in nearly the same terms as are used in R. L., c. 30, § 1. In Acts of 1788, c. 30, these provisions remained practically the same in form and substance. The revision of the laws in 1836 (R. S., c. 16) changed the form of the statute, and the form at that time adopted has, with minor changes, been retained (G. S., c. 22; P. S., c. 33), though many new provisions relative to commitments to workhouses for misdemeanors have been made.

There is, however, nothing which to my mind sufficiently strongly indicates any other intent as to the meaning of "committed" and "commitment" to rebut the inference from the way in which the words were used in the earlier statutes. The dis-

appearance of the provision authorizing overseers to commit was doubtless due to the fact that it seemed to be unnecessary, in view of the provision which was enacted in 1788 and now appears in R. L., c. 81, § 2, giving overseers the power to see that poor and indigent persons "are suitably relieved, supported or employed either in the workhouse or almshouse, or in such other manner as the city or town directs, or otherwise at the discretion of said overseers." The omission of the word "so" ("thus" in St. 1788) before "committed," in St. 1743-44, was required by the change in the form of the statute, and by the intention to include within the scope of the provision persons committed under authority of later acts by order of court; but there was nothing in it tending to limit the application of the provision to such persons. The use of the expression "within the time for which he was committed," in the section relating to discharges, and the expression "during the term of his commitment," in the section to be construed, is not inconsistent with a situation where some of the persons referred to are committed for definite, some for indefinite, periods; and the addition of the words "or received," in Gen. St., c. 22, § 17, and later revisions, to the provision requiring the master of each workhouse to keep a register "of the names of the persons committed," was hardly sufficient to impress upon the words "committed" and "commitment," wherever they occur, a technical meaning which they certainly did not have in the early statutes dealing with the same subject.

It seems, therefore, that these words should be broadly interpreted, and consequently that the requirement of diligent employment in labor, in § 21, applies to all persons enumerated in § 1. This conclusion is further supported by the provision of § 16, that cities and towns may provide implements, etc., "for the employment of inmates" of workhouses, and by the provision of § 1, above quoted, that "a city or town may erect or provide a workhouse . . . for the *employment* . . . of indigent persons."

GREAT PONDS — SOURCES OF WATER SUPPLY — RULES AND
REGULATIONS OF STATE BOARD OF HEALTH — COMMISSION-
ERS OF FISHERIES AND GAME — DUTY TO STOCK WITH FOOD
FISH.

Rules and regulations established by the State Board of Health, under the provisions of R. L., c. 75, § 113, "to prevent the pollution and to secure the sanitary protection of all such waters as are used as sources of water supply," are police regulations, and, in the case of a great pond so used, will limit and control the right of the public to the use thereof for boating, fishing or other like purposes, so far as such use by the public is inconsistent with the use of such pond as a source of water supply.

Where rules and regulations established by the State Board of Health, under the provisions of R. L., c. 75, § 113, relating to a great pond used as a source of water supply, forbid to the public fishing, boating or bathing therein or taking ice therefrom, the provisions of R. L., c. 91, § 19, directing the Commissioners of Fisheries and Game, upon petition duly made as prescribed, to cause the waters of any great pond to be stocked with food fish, and to make reasonable regulations relative to the fishing therein, is not applicable, and such commissioners are not required to act thereunder.

To the Com-
missioners on
Fisheries and
Game.
1904
November 25.

You have required my opinion upon the effect which certain rules and regulations made by the State Board of Health, under R. L., c. 75, § 113, may have upon the duty of the fish and game commission, under the provisions of R. L., c. 91, § 19.

R. L., c. 75, § 112, is as follows: —

The state board of health shall have the general oversight and care of all inland waters and of all streams and ponds used by any city, town or public institution or by any water or ice company in this commonwealth as sources of water supply and of all springs, streams and water courses tributary thereto. It shall be provided with maps, plans and documents suitable for such purposes and shall keep records of all its transactions relative thereto.

Section 113 reads: —

Said board may cause examinations of such waters to be made to ascertain their purity and fitness for domestic use or their liability to impair the interests of the public or of persons lawfully using them or to imperil the public health. It may make rules and regulations to prevent the pollution and to secure the sanitary protection, of all such waters as are used as sources of water supply.

R. L., c. 91, § 19, provides that:—

The commissioners, upon the petition of the mayor and aldermen of a city or of the selectmen of a town within which a great pond or a portion thereof is situated, or of thirty or more inhabitants thereof, shall cause the waters of such pond to be stocked with such food fish as they judge to be best suited to such waters. They shall thereupon prescribe, for a period not exceeding three years, such reasonable regulations relative to the fishing in such ponds and their tributaries, with such penalties, not exceeding twenty dollars for one offence, as they deem to be for the public interest, and shall cause such regulations to be enforced. Five hundred dollars shall be annually appropriated by the commonwealth to carry out the provisions of this section.

This section was amended by St. 1903, c. 274, which authorized the commission to restock such ponds with food fish.

The facts submitted in your communication are applicable to North Watuppa Pond and its tributaries, which is used by the city of Fall River as a source of water supply.

Acting under the authority of R. L., c. 75, § 113, the State Board of Health has made certain rules and regulations governing North Watuppa Pond and its tributaries, of which only § 14 is material to the present question.

14. No person shall bathe in, and no person shall, unless permitted by a special regulation or by a written permit of the Watuppa water board of the city of Fall River, fish in, or send, drive or put any animal into North Watuppa Pond, so called, said pond being in the city of Fall River and the town of Westport and used by said city as a source of water supply. No person other than a member of said Watuppa water board, its officers, agents or employees, or public officers whose duties may so require, shall, unless so permitted by regulation or permit of said Board, enter or go, in any boat, skiff, raft or other contrivance, on or upon the water of said pond, nor shall enter or go upon, or drive any animal upon, the ice of said pond.

Your letter also states that the board of health for the city of Fall River has also established rules and regulations relating to North Watuppa Pond, in substance like those above quoted; but, inasmuch as it is the clear intendment of R. L., c. 75, §§ 112

to 130, to place the entire regulation of sources of water supply within the sole jurisdiction of the State Board of Health, I do not regard the local regulations referred to as material upon the matter of your inquiry. It is true that local boards may still control and abate nuisances which may be found within their jurisdiction and upon or adjacent to great ponds, whether or not such ponds are used as sources of water supply (see *Stone v. Heath*, 179 Mass. 388); but there is no statutory authority for the establishment by them of any permanent rules or regulations relating to sources of water supply. Such regulations, therefore, can have no effect upon the duties of the fish and game commission.

The power of the State Board of Health to make rules and regulations is conferred in order "to prevent the pollution and to secure the sanitary protection" of great ponds which are used as sources of water supply. This is a police regulation, and, in so far as such rules and regulations are necessary for the preservation of the purity of the water, they will control the provisions of general statutes regulating the rights of the public in great ponds. On the other hand, the fact that a great pond has been taken as a source of water supply does not in and of itself necessarily deprive the public of the right of fishing, or, indeed, of any other right which may be exercised without interfering with the use of the pond as a source of water supply. See *Rockport v. Webster*, 174 Mass. 385; 2 *Op. Atty-Gen.* 239.

It must be assumed, therefore, that the rules and regulations made by the State Board of Health, under authority of R. L., c. 75, § 113, were based upon some finding or adjudication by such Board that the use of the waters so regulated by the public for boating, fishing or taking ice, is or is likely to become a source of pollution and an injury to the water taken therefrom for the purposes of water supply, in which case the rules and regulations are authorized and are binding upon the public.

It remains to consider the effect of this rule or regulation upon R. L., c. 91, § 19. This statute is mandatory, and imposes a duty upon the Commissioners on Fisheries and Game to stock the waters of a great pond whenever a petition of the prescribed

character is addressed to them; yet, if the requirement of the section is absolute, it would follow, in the case of North Watuppa Pond, that upon petition they would be required to stock such pond without the authority to use a boat, if a boat were necessary, in distributing the fish, and the petitioners would not be permitted to derive any benefit therefrom unless the permission of the Watuppa water board of the city of Fall River was obtained. Moreover, it is within the bounds of possibility that at any time the State Board of Health may absolutely forbid fishing and boating, and thus render the operation of stocking such pond not only useless to the public, but, conceivably, injurious to the waters of the pond as a source of water supply.

In view of these contradictions, it seems to me impossible to hold that any duty under R. L., c. 91, § 19, rests upon your commission to stock a pond used as a source of water supply, and upon the public enjoyment of which rules and regulations of the State Board of Health similar to those under consideration have been imposed. In other words, a great pond which is set apart as a source of water supply is, in a measure, withdrawn from the status of a great pond, and all public rights attaching thereto are subordinated to the single use to which the Legislature has devoted it. It is true that to a limited extent other public rights therein may be still exercised; but the jurisdiction of the fish and game commission is so seriously affected that, in my opinion, the mandatory language of § 19 would not be applicable, and the commission must be permitted to use its discretion in determining whether or not, in consideration of the existing rules and regulations of the State Board of Health, it is advisable or proper to comply with a petition for stocking such a great pond.

CORPORATION — TAXATION — VALUATION OF CORPORATE FRANCHISE — DEDUCTIONS — LEASED LAND.

Under St. 1903, c. 437, § 72, providing in part that from the value of the corporate franchise of a corporation, as ascertained by the Tax Commissioner for the purposes of taxation, there may be deducted the value of its real estate and machinery within the Commonwealth subject to local taxation, the Tax Commissioner may deduct the value of real estate leased but not owned by such corporation, and the value of buildings thereon erected by it.

To the Tax
Commissioner.
1905
February 8.

You have asked my opinion upon certain questions arising under St. 1903, c. 437, § 72, the statute providing for the assessment of a franchise tax upon Massachusetts corporations. This statute, so far as your questions make it important to consider it, is not different from the provisions of the earlier law which it has superseded.

The section provides, in part: —

The tax commissioner shall annually ascertain from the returns required by the provisions of this act, or in any other manner, the market value of the shares of the capital stock of each domestic corporation which is subject to the provisions of this act, and shall estimate therefrom the fair cash value of all of the shares constituting its capital stock on the preceding first day of May, which shall, for the purposes of this act, be taken as the value of its corporate franchise. From such value there shall be deducted the value as found by the tax commissioner of its real estate and machinery within the Commonwealth subject to local taxation and of securities which, if owned by a natural person resident in this Commonwealth, would not be liable to taxation; . . .

You ask whether you ought to deduct the value of real estate which is not owned by the corporation, but is leased by it. Under the laws providing for the taxation of real estate by a city or town, the local authorities may tax directly to the corporation real estate of which it is the lessee. The local assessors make a return to you, in which it appears whether such real estate is taxed to the corporation which is the lessee, or to the lessor. If it appears that such leased real estate is taxed to the corporation, I am of opinion that you should deduct it from the value of the corporate franchise. The purpose of the statute, considering it as a whole, is to prevent double taxation, and to insure that property

which under the law is subject to a tax which the corporation pays shall not be included in the valuation upon which the excise tax is based. It is obvious that there is no essential difference in this regard, whether the corporation is the owner or the lessee. In either case double taxation will result if the corporation is required to pay a direct tax to the city or town, and an excise tax based upon the value of the leased real estate. In this opinion I assume that the value of the leased real estate enters to make up the market value of the shares of its capital stock. If it does not so enter, it ought not to be deducted.

You ask, next, whether a similar deduction should be made on account of buildings erected by a corporation upon land leased by it. Similar reasoning applies to this question. If the buildings go to increase the value of the capital stock in your estimate of it, you should deduct their value when the corporation pays upon them a direct tax. If the local authorities tax the land to the lessee, the buildings upon the land may not be taxed separately to the lessor. See *McGee v. Salem*, 149 Mass. 238.

You ask, further, whether a corporation has a right to a deduction for real estate occupied for purposes other than those for which it is incorporated. I see no reason to make a distinction based upon the purpose for which the corporation uses its leased real estate.

You ask, furthermore, whether a mortgage upon a corporation's real estate is to be considered as a debt due under R. L., c. 12, § 4. That statute is the statute concerning direct taxation by local officials. A determination of the question does not enter into your duties in assessing franchise taxes under § 72. I therefore do not consider it.

CORPORATION — TAXATION — VALUATION OF CORPORATE FRANCHISE — DEDUCTIONS — SECURITIES — DEPOSITS IN SAVINGS BANKS AND CERTIFICATES OF INTEREST IN VOLUNTARY ASSOCIATIONS AND TRUSTS — NOTES RECEIVABLE — MACHINERY AND MERCHANDISE — BOATS, WAGONS AND OTHER APPLIANCES.

Under the provisions of St. 1903, c. 437, §§ 72 and 74, in part relating to deductions from the value as ascertained by the Tax Commissioner of the corporate franchise of a corporation liable thereunder to an excise tax upon such franchise, deposits in savings banks within the Commonwealth and certificates of interest in voluntary associations and trusts, as well as notes receivable, are to be deemed "securities" within the meaning of § 72, and are to be deducted from the value of such corporate franchise.

The phrase "machinery and merchandise," as used in St. 1903, c. 437, §§ 72 and 74, includes boats, steamboats, vessels, carts, wagons, horses, furniture and fixtures which are not part of the real estate, owned by a domestic corporation.

To the Tax
Commissioner.
1906
February 17.

You have asked my opinion upon certain questions arising under §§ 72 and 74 of c. 437 of St. 1903, — the law providing for the assessment of franchise taxes upon domestic business corporations.

Under the scheme of corporate taxation, the real estate and machinery are locally taxed by the city or town where they are situated. The merchandise and other property enter into the value of the capital stock, and are taxed to the corporation by the State; then the tax is divided among the towns and cities where the stockholders reside, in order to compensate them for loss of the tax which, under the old law, they received by taxing shares of stock to their owners.

Under § 72, in theory, there enters into the value of the capital stock not only what is strictly merchandise, according to the colloquial use of that term, but also every bit of the corporation's property, including its good-will, except what is locally taxed, and except securities which are exempt from taxation to their owner if owned by a natural person. The object of making these deductions is obviously to avoid double taxation. Securities which are not taxed to their owner are omitted from the scheme of direct taxation merely because they are indirectly taxed.

If they were not deducted from the value of the corporate franchise, the corporation would really be taxed twice for them, their income value being already reduced by some mode of indirect taxation. It is the intention of the franchise tax law to cover all corporate property once, and only once.

You ask whether deposits in savings banks and certificates of interest in voluntary associations and trusts are to be deducted from the value of the corporate franchise. These, in my opinion, are all securities. Since deposits in Massachusetts savings banks and shares in voluntary associations and trusts are not taxable to individuals owning them, they are to be deducted. As to such shares, see *Hoadley v. County Commissioners*, 105 Mass. 519. The clause of the statute under which this deduction is made is new in the act of 1903, and avoids the effect of my opinion of January 6, 1903.

Deposits in foreign savings banks, on the other hand, being taxable to individual owners, are not to be deducted.

That part of § 74 to which you direct my attention first appears in the law of 1903. It provides as follows:—

But the said tax upon the value of the corporate franchise after making the deductions provided for in section seventy-two, shall not exceed a tax levied at the rate aforesaid upon an amount, less said deductions, twenty per cent. in excess of the value, as found by the tax commissioner, of the real estate, machinery and merchandise, and of securities which if owned by a natural person resident in this commonwealth would not be liable to taxation.

The statute is quoted as amended by St. 1904, c. 261.

The evident theory upon which this clause proceeds is this: a corporation having no property, except real estate, merchandise and stock in process of manufacture, all of which are taxed, whether owned by a corporation or a natural person, may have a valuable good-will, created by the brains of its managers, which will bring the market value of its capital stock far above the value of its tangible property. This good-will, which is not taxed to a natural person who owns real estate, machinery and stock in process of manufacture, it was the belief of the Legis-

lature ought not to be too heavily taxed to a corporation; but some tax more than a natural person would have to pay ought to be imposed, in return for the advantage derived from the privilege of being a corporation. This amount was roughly set at a sum derived from taking the current tax rate upon twenty per cent. in excess of the value as found by the Tax Commissioner of the real estate, machinery and merchandise, and of securities which if owned by a natural person resident in this Commonwealth would be liable to taxation; then, to guard against the case of a corporation having intangible property enormously in excess of its tangible property, a minimum limit was fixed, by the provision that a corporation must pay, in both local and State taxes, at least an amount equal to one-tenth of one per cent. of the market value of its capital stock.

To give an illustration in figures: suppose a corporation has 10,000 shares of stock of the par value of \$1,000,000, with real estate worth \$50,000, machinery worth \$450,000, and other tangible property amounting to \$500,000, and that the market value of its stock is \$2,500,000. Such corporation must pay at least \$2,500 in taxes. If there were no maximum limit, and the rate of taxation were \$12 on \$1,000, it would have to pay, in addition to local taxes on \$500,000, a franchise tax of \$24,000. At the same rate it would pay under this section a franchise tax of \$8,400.

This clause, cutting down the franchise tax of corporations having intangible property of great value, being an exempting statute, must be strictly construed against the exemption. See *Redemptorist Fathers v. Boston*, 129 Mass. 178, 180. The leading idea of the scheme of taxation is that all the property of a corporation which if owned by an individual would be taxable shall pay a tax; and, in addition, that a part of the intangible assets entering into the market value of the capital stock shall be taxed. By the term "real estate, machinery and merchandise," the Legislature intended to cover all the tangible property of a business corporation; and by the term "securities," as used in the statute, all choses in action which would be taxable to a natural person resident in Massachusetts. Any different con-

struction of this clause would operate to exempt certain kinds of business corporations from all taxes except the taxes on real estate. Take, for example, an express business using no taxable property except horses and wagons. The owner, by merely incorporating it, would pay no tax at all.

I advise you, therefore, that boats, steamboats and vessels, carts, wagons and horses, owned by domestic corporations, are included within the phrase "machinery and merchandise;" and that furniture and fixtures, if not so affixed to the building as to be real estate, are also within the phrase. Notes receivable, though unsecured, taken by a corporation in payment for notes in settlement of accounts, are also to be considered securities within the intent of the section. See *Jennings v. Davis*, 31 Conn. 134.

TREASURER AND RECEIVER-GENERAL — INVESTMENT OF FUNDS
CONTROLLED BY THE COMMONWEALTH — COUNTIES, CITIES
AND TOWNS — NET INDEBTEDNESS.

In R. L., c. 6, § 65, providing that "funds over which the commonwealth has exclusive control shall be invested by the treasurer and receiver-general . . . in the notes or bonds of the several counties, cities and towns thereof, or in the scrip or bonds of the United States, of the several New England states, or in the state of New York, in the notes or bonds of any incorporated district in this commonwealth or of any city of the New England states issued for municipal purposes, whose net indebtedness at the time of purchase does not exceed five per cent. of the last preceding valuation of the property therein for the assessment of tax;" . . . the clause, "whose net indebtedness at the time of the purchase does not exceed five per cent. of the preceding valuation," does not relate to counties, cities and towns of the Commonwealth in the notes or bonds of which the Treasurer and Receiver-General is authorized to invest funds of the Commonwealth.

You inquire, in your communication of February 28, whether or not the clause, "whose net indebtedness at the time of purchase does not exceed five per cent. of the preceding valuation," in R. L., c. 6, § 65, has reference to the counties, cities and towns of this Commonwealth mentioned in the early part of such section. The statute is as follows:—

To the
Treasurer
and Receiver-
General.
1906
March 2.

Funds over which the commonwealth has exclusive control shall be invested by the treasurer and receiver general with the approval of the

governor and council, in securities of the commonwealth, in the notes or bonds of the several counties, cities, and towns thereof, or in the scrip or bonds of the United States, of the several New England states, or of the state of New York; in the notes or bonds of any incorporated district in this commonwealth or of any city of the New England states, issued for municipal purposes, whose net indebtedness at the time of purchase does not exceed five per cent. of the last preceding valuation of the property therein for the assessment of taxes; or in the notes of any corporation established within this commonwealth to become due in one year or less time if secured by a pledge of bonds of the United States or of this commonwealth of at least an equal value estimating them at not more than eighty-five per cent. of their market value.

I have no hesitation in advising you that, in my opinion, the clause in question does not relate to counties, cities and towns of the Commonwealth in the notes or bonds of which the Treasurer and Receiver-General is authorized to invest funds of the Commonwealth. The punctuation, which, perhaps, is not conclusive, as well as the subject-matter of the provision, indicate clearly that it was the intention of the Legislature to make legal the investment of the funds of the Commonwealth in three classes of securities: first, securities of the Commonwealth, notes or bonds of the several counties, cities and towns thereof, or scrip or bonds of the United States, of the New England States, or of the State of New York; second, in the notes or bonds of any incorporated district in this Commonwealth, or of any city in the New England States, whose net indebtedness at the time of the purchase does not exceed five per cent. of the last preceding valuation of the property therein for the assessment of taxes; third, in the notes of any corporation established within this Commonwealth, with certain qualifications. The provision with regard to net indebtedness is obviously inapplicable either to the scrip or bonds of the United States, the securities of the Commonwealth itself, or the scrip or bonds of the several New England States or the State of New York, all of which are included within the same clause as the notes or bonds of the several counties, cities and towns of the Commonwealth; and it follows that investment in the latter is permitted by the section above quoted, with no greater restrictions than those governing investments

in the securities of the Commonwealth, and the scrip or bonds of the United States, the several New England States and the State of New York.

ARMORIES — OCCUPATION AND USE — PROPER MILITARY PURPOSES — CONTROL — RULES AND REGULATIONS.

R. L., c. 16, § 116, providing that armories furnished for the militia "shall not be used except by the active militia," or "let to or occupied by any one except for a proper military purpose," includes all armories used by the volunteer militia, whether furnished by cities and towns or constructed by the Commonwealth under R. L., c. 16, §§ 106-112. Whether or not a particular purpose for which it is desired to use an armory is a proper military purpose is a question of fact which may probably be determined by the Adjutant-General.

Under the provisions of R. L., c. 16, § 117, which provides that an officer whose command occupies an armory shall have control of the premises during such occupation, "subject to the orders of his superior officers," reasonable rules and regulations governing the occupancy of the building used as an armory and the conduct of members of the militia upon the premises may be issued from military headquarters.

I beg to acknowledge the receipt of two communications addressed to you by the lieutenant-colonel of the Second Corps of Cadets, with reference to which you desire my opinion.

To the
Adjutant-
General.
1905
March 31.

I assume, from an examination of such communications, that the questions upon which I am to express an opinion are substantially as follows:—

1. Whether or not an armory furnished under the provisions of R. L., c. 16, § 105, to certain companies of the volunteer militia, may be used as a place for giving concerts by a musical organization.

2. Whether or not the Adjutant-General may make rules and regulations governing the use and occupancy of an armory furnished and occupied under the provisions of R. L., c. 16, § 105.

In reply to the first question, I am of opinion that R. L., c. 16, § 116, relates to and includes all armories used by the volunteer militia, whether such armories are furnished by cities and towns or are constructed by the Commonwealth under R. L., c. 16, §§ 106 to 112, and must be construed to forbid the use of such armories except by the active militia, and for proper military

purposes. Whether or not the particular purpose for which it is desired to use the armory in question is a proper military purpose, is a question of fact which may probably be determined by the Adjutant-General. See 1 Op. Atty.-Gen. 508.

To the second inquiry it is impossible to return a definite answer, since the rules alluded to in the communication of the lieutenant-colonel of the Second Corps of Cadets are not submitted therewith. In general, it may be said, however, that R. L., c. 16, § 111, refers to armories constructed under R. L., c. 16, §§ 106 and 107, and is not, as it stands, applicable to R. L., c. 16, § 105. See St. 1888, c. 384. I am of opinion that under R. L., c. 16, § 117, which provides that an officer whose command occupies an armory shall have control of the premises during the period of occupation, "subject to the orders of his superior officers," the issuance from military headquarters of reasonable rules and regulations governing the occupancy of the building used as an armory and the conduct of members of the militia upon the premises is authorized. In the absence of the specific rules and regulations in question, I am unable to say whether or not they may be regarded as authorized by this section.

BUILDING LAWS — THEATRE — ROOF GARDEN.

Where it is designed to construct a roof garden over and upon a theatre, the entire structure, from the auditorium to the roof and roof garden or other assembling place so constructed, must be treated as a part of a building designed and used as a theatre, within the meaning of R. L., c. 104, § 36, and is subject to all the regulations and restrictions therein established governing the use of such building as a theatre.

To the Chief
of the Massa-
chusetts Dis-
trict Police.
1905
April 21.

In your letter of the 4th instant you request my opinion on the application of R. L., c. 104, § 36, to certain facts, which you state to be as follows:—

It is designed to construct, upon the roof of a building constructed and used as a theatre, a roof garden, so called, the first floor of the building to contain the main auditorium, lobby, stage stairs and exits of the theatre, together with galleries and appliances to be used in connection with the scenery. The roof

garden above is to have sides a few feet in height, and is to be provided with a stage, but with no scenery. Performances are to be given by persons in costume.

The specific questions asked are: —

If allowed, should this roof garden be considered as a place of assemblage, or as a theatre, for the purpose of designing the number and width of exits? Can the exits from the proposed roof garden connect with the gallery or auditorium, or must independent ways of exit be provided?

R. L., c. 104, § 36, is as follows: —

The audience hall in a building which is erected or designed to be used in whole or in part as a theatre or in which any change or alteration shall be made for the purpose of using it as a theatre shall not be placed above the second floor of said building. The audience hall and each gallery of every such building shall, respectively, have at least two independent exits, as far apart as may be, and if the audience hall is on the second floor, the stairways from said floor to the ground floor shall be enclosed with fireproof walls from the basement floor up, and shall have no connection with the basement or first floor of the building. Every such exit shall have a width of at least twenty inches for every one hundred persons which such hall, or gallery from which it leads, is capable of holding; but two or more exits of the same aggregate width may be substituted for either of the two required exits. None of the required exits shall be less than five feet wide.

It is first necessary to determine what constitutes a "theatre," within the meaning of this statute. The word is derived from a Greek word, meaning "place for seeing shows," and in the Century Dictionary is defined as follows: —

1. A building appropriated to the representation of dramatic spectacles; a playhouse.
2. A room, hall, or other place, with a platform at one end, and ranks of seats rising stepwise as the tiers recede from the center, or otherwise so arranged that a body of spectators can have an unobstructed view of the platform.
3. A place rising by steps or gradations like the seats of a theatre.

In general, a theatre may be said to be a building especially adapted to dramatic, operatic or spectacular representations; or,

in a still wider and more colloquial sense, a room or hall arranged with seats which rise as they recede from the platform or stage, especially adapted to lectures and other public entertainments. As used in the statutes, I am of opinion that the word "theatre" is usually employed to designate a playhouse or building with seats for spectators, containing a stage provided with curtains, scenery and other furniture, and adapted to and used for the giving of dramatic entertainments. See 1 Op. Atty.-Gen. 306. This view is confirmed by a consideration of St. 1904, c. 450, which in § 1 defines the word "theatre" as follows:—

In this act the term "theatre" shall mean a building or part of a building in which it is designed to make a business of the presentation of dramatic, operatic or other performances or shows for the entertainment of spectators, which is capable of seating at least four hundred persons, and which has a stage for such performances that can be used for scenery and other stage appliances. The term "public hall" shall mean any building, or part of a building, excluding theatres, armories and churches, containing an audience or assembly hall capable of seating four hundred persons, and used for public gatherings.

Under this definition, which is given in connection with legislation relating directly to the same buildings or structures as those regulated in R. L., c. 104, § 36, a roof garden may or may not be a theatre, according to the manner of its construction and the method of its use; and, if established and maintained in a building not otherwise used as a theatre, might not, under a certain state of facts, be subject to the regulations controlling exits, passageways and stairways which are made applicable to theatres by R. L., c. 104, § 36.

I am clearly of opinion, however, that in the present case, where it is designed to construct a roof garden over and upon a theatre, the entire structure, from the auditorium to the roof, is to be regarded as a theatre. Ordinarily, no part of a building above the floor of the auditorium of a theatre is employed for other distinct theatrical performances, and it would seem that the Legislature had made no provision for a case like the present; but I am of opinion that, if such construction is permissible at all, — and it certainly is not expressly forbidden, — the roof

garden must be treated as another gallery of the theatre, for reasons entirely distinct from the character of its fittings or of the entertainments which are shown there. The rules and regulations prescribed in the matter of exits of theatres were intended for the safety of the public; and it does not require argument to show that the danger from fire, panic or other disaster to persons above the first floor is equally great, whether they are attending a theatrical performance below the roof, or a roof garden entertainment above. I think, therefore, that, while the Legislature certainly did not contemplate the imposition of an assembling place of any kind above a theatre, if such place is constructed, it must be treated as a part of, and subjected to all the restrictions governing, the building designed to be used in whole or in part as a theatre.

The same considerations lead me to the opinion that the roof garden in the present case, constructed, as it is, above a theatre which contains a main auditorium on the first floor, and a gallery, must be regarded as above the second floor.

In reply to your specific inquiries in regard to details of construction I express no opinion, since they are apparently disposed of by the determination of the broader question.

BOARD OF METROPOLITAN PARK COMMISSIONERS — APPROPRIATION FOR BOULEVARDS — EXPENDITURE.

The Board of Metropolitan Park Commissioners may expend money appropriated under the "boulevard act," so called (St. 1894, c. 288), in constructing a roadway or boulevard over and across land already acquired by such Board under the general powers conferred in St. 1893, c. 407, if the purpose of such construction is to connect a road, park, way or other public open space with any part of the cities or towns of the metropolitan parks district under the jurisdiction of the Board.

You desire my opinion upon the question whether or not the Metropolitan Park Commission may expend appropriations made under St. 1894, c. 288, and acts in amendment thereof and in addition thereto, authorizing the construction of roadways and boulevards, in the construction of such roadways and boulevards

To the Metropolitan Park Commission.
1906
April 25.

upon land acquired by them under and by authority of St. 1893, c. 407, and subsequent legislation, authorizing the Board to acquire, maintain and make available open spaces for exercise and recreation; or, in other words, to quote the specific question submitted, "Can moneys appropriated for roadways and boulevards be used in constructing roadways and boulevards in lands acquired for park purposes?"

St. 1894, c. 288, provides in § 1 as follows: —

The board of metropolitan park commissioners, constituted under the authority of chapter four hundred and seven of the acts of the year eighteen hundred and ninety-three, is hereby authorized to connect any road, park, way or other public open space with any part of the cities or towns of the metropolitan parks district under its jurisdiction, by a suitable roadway or boulevard, and for this purpose to exercise any of the rights and powers granted to said board by said act, in the manner prescribed by said act, and also to take or acquire in fee or otherwise, in the name and for the benefit of the Commonwealth, by purchase, gift, devise or eminent domain, any lands or rights or easements or interest in land within said district, although the land so taken or any part thereof be already a street or way, and to construct and maintain along, across, upon or over the same or any other land acquired by said board by said act, a suitable roadway or boulevard: *provided, however*, that the concurrence of the board of aldermen in the city of Boston for the county of Suffolk, or the concurrence of each other county or city or town outside of said county of Suffolk, wherein any portion of any street, way, land or rights in land is taken by right of eminent domain be obtained, to the taking of said portion by vote of its county commissioners, city government or board of selectmen respectively.

I am of opinion that under this section the Board is expressly authorized to construct roadways and boulevards "along, across, upon or over" land taken by it under the provisions of St. 1894, c. 288, "or any other land acquired by said board by said act," said act being St. 1893, c. 407. The purpose of St. 1894, c. 288, is "to connect any road, park, way or other public open space with any part of the cities or towns of the metropolitan parks district under its jurisdiction, by a suitable roadway or boulevard;" and such connection may be made under the act, notwithstanding that some of the land traversed has been already

acquired for public open spaces or other purpose authorized by the statutes.

It follows, therefore, that money appropriated under the "boulevard act," so called, above quoted, may be expended in constructing a roadway or boulevard over and across land already acquired by the commission under the general powers conferred in St. 1893, c. 407, if the purpose and object of such construction is to connect a road, park, way or other public open space with any part of the cities or towns of the metropolitan parks district under the jurisdiction of the Board.

You also submitted a specific question, as follows:—

The Mystic Valley Parkway, extending from Winchester down to West Medford, along the banks of the Mystic River, was acquired and constructed under the boulevard act. Subsequently, lands were taken under the park act for the Mystic River Reservation from the Medford end of the Mystic Valley Parkway down the banks of the Mystic River for a considerable distance. The commission have under consideration the building of a park road over the lands taken for the Mystic River Reservation from the end of the Mystic Valley Parkway in West Medford to a connection with a parkway in Somerville known as the Powder House Hill Parkway, which last-named parkway is the property of the city of Somerville. They wish to know whether they may properly use funds appropriated under the boulevard act for building this proposed park road.

This is a question of fact. If the connection desired is within the spirit of and is authorized by St. 1894, c. 288, § 1, as a connection between a road, park, way or other public open space and a part of the cities or towns of the metropolitan parks district, the cost of the construction made necessary thereby may properly be defrayed from funds appropriated under the so-called "boulevard act."

ATTORNEY-GENERAL — DETERMINATION OF QUESTIONS INVOLVING CONDITIONS BEYOND THE JURISDICTION OF LAW OF COMMONWEALTH — NEW YORK, NEW HAVEN & HARTFORD RAILROAD CORPORATION — CONSOLIDATED CORPORATION — LEGISLATURE — CONTROL — ACQUISITION OF STOCK IN MASSACHUSETTS STREET RAILWAY CORPORATIONS — FORFEITURE OF CHARTER — CONTROL OF DOMESTIC STREET RAILWAY CORPORATION BY FOREIGN CORPORATION.

The Attorney-General cannot be required to determine the difference between "the rights, privileges and duties of the Boston & Maine Railroad Company and the New York, New Haven & Hartford Railroad Company in the matter of the purchase of the stock or bonds of street railway corporations," since such determination would involve a consideration of conditions arising beyond the jurisdiction of the laws of the Commonwealth.

The Legislature of the Commonwealth must be assumed to have conceded by implication the right to the consolidated corporation, the New York, New Haven & Hartford Railroad Company, to exercise such powers as the State of Connecticut, acting upon matters within its exclusive jurisdiction, could grant to it, and to reserve to itself the right to exercise exclusive control over the corporation only as to such matters as should be within its exclusive jurisdiction.

Under R. L., c. 111, § 77, the acquisition by the New York, New Haven & Hartford Railroad Company of all or part of the stock of a Massachusetts street railway corporation is illegal; and the Attorney-General, by appropriate process, may invoke the action of the courts either to nullify or restrain such transaction, or to effect the forfeiture of the charter of such corporation in so far as the same exists by grant of this Commonwealth.

Any action upon the part of the New York, New Haven & Hartford Railroad Company in the State of Connecticut for the purpose of acquiring control of a Massachusetts street railway corporation, although such action was authorized by the laws of Connecticut, would render the charter and franchises of such company, in so far as they existed by grant of the Legislature of Massachusetts, liable to forfeiture.

The ownership or control by the Consolidated Railway Company of Connecticut, a foreign corporation, of a majority of the capital stock of one or more Massachusetts street railway companies, is such ownership and control as is intended by R. L., c. 126, § 11, providing that, where a majority of the capital stock of a domestic street railway, gas light or electric light corporation is owned or controlled by a foreign corporation, which makes such ownership or control the basis of a security for an issue of stock, bonds or other evidence of indebtedness, the Supreme Judicial Court shall have jurisdiction to dissolve the charter of such domestic corporation.

To the House
of Representatives.
1905
April 28.

I have the honor to acknowledge the receipt of an order of the honorable House of Representatives, requesting the opinion of the Attorney-General upon certain questions set forth therein. A copy of said order so transmitted to me is as follows: —

Ordered, That the Attorney-General be requested to transmit to the House of Representatives his opinion in writing in answer to the following questions:—

1. Wherein differ the rights, privileges and duties of the Boston & Maine Railroad Company and the New York, New Haven & Hartford Railroad Company in the matter of the purchase of the stocks or bonds of street railway corporations?

2. Your honorable predecessor, in an opinion transmitted to the Senate and House of Representatives March 16, 1894, relating to the New York, New Haven & Hartford Railroad Company, said: "Acting with full knowledge of and acquiescence in the fact that the railroad company it incorporated had already received a similar charter from Connecticut, the Legislature of Massachusetts must be presumed to have conceded, by implication, the right to the consolidated corporation to have and exercise such powers as the State of Connecticut, acting upon matters within its exclusive jurisdiction, should grant to it by virtue of its sovereignty; and to reserve to itself the right to exercise exclusive control over the corporation only as to such matters as should be within its exclusive jurisdiction." Do you concur with these views, and in that case do you or do you not think that the direct or indirect acquisition of all or part of the stock of a Massachusetts street railway corporation by the New York, New Haven & Hartford Railroad Company falls within the jurisdiction of Massachusetts to an extent sufficient to make it illegal in view of the following provision of law? R. L., c. 111, § 77: "No railroad corporation, unless authorized by the general court or by the provisions of the following five sections, shall directly or indirectly subscribe for, take or hold the stock or bonds of or guarantee the bonds or dividends of any other corporation," etc. If such acquisition is in your opinion illegal, what is the penalty, and how may it be enforced?

3. R. L., c. 111, § 62, says: "If a railroad corporation which owns a railroad in this commonwealth and is consolidated with a corporation in another state which owns a railroad therein increases its capital stock or the capital stock of such consolidated corporation, except as authorized by this chapter, without authority of the general court, or without such authority extends its line of road, or consolidates with any other corporation, or makes a stock dividend, the charter and franchise of such corporation shall be subject to forfeiture." Your honorable predecessor, in the opinion before quoted, commenting on this provision, said: "The law amounts to nothing more than a declaration of the policy of the State, and it does not pretend to prohibit, much less to make unlawful, the acts of a consolidated corporation done in another State, and under the lawful authority of the Legislature of that State." Assuming this to be the case as far as relates to acts of the New York, New Haven & Hartford Railroad Company done in Connecticut under the lawful authority of the

Legislature of that State, what would be the bearing of the law on acts done in either Connecticut or Massachusetts for the purpose of acquiring control of a Massachusetts corporation, such, for instance, as an increase of capital stock to accomplish that purpose directly or indirectly?

4. R. L., c. 126, § 11, says, in part: "If a foreign corporation which owns or controls a majority of the capital stock of a domestic street railway corporation issues stock, bonds or other evidences of indebtedness based upon or secured by the property, franchise or stock of such domestic corporation, unless such issue is authorized by the law of this commonwealth, the supreme judicial court shall have jurisdiction in equity in its discretion to dissolve such domestic corporation. If it appears to the attorney-general that such issue has been made, he shall institute proceedings for such dissolution and for the proper disposition of the assets of such corporation." It is currently reported that the Consolidated Railway Company of Connecticut, a foreign corporation, owns or controls a majority of the capital stock of one or more Massachusetts street railway companies. If such majority of the capital stock were held by Massachusetts trustees for the benefit of a foreign corporation, would that be tantamount to the "control" meant by the law? Does the section establish clearly that it is the policy of Massachusetts not to permit such control unless it is authorized by law?

Assuming such to be the policy of the Commonwealth, what, if any, change should be made in this section to carry that policy into full effect?

The first inquiry is presented in the following form: —

Wherein differ the rights, privileges and duties of the Boston & Maine Railroad Company and the New York, New Haven & Hartford Railroad Company in the matter of the purchase of the stock or bonds of street railway corporations?

Addressing myself to the precise inquiry presented, and without assuming to modify it by my own interpretation of its intent, I must hold it to be an inquiry so broad in its scope as to involve an attempt on my part to define all the privileges and duties of the two corporations referred to in the matter of the purchase of the stock or bonds of street railway companies, wheresoever and in or under whatsoever jurisdiction the inquiry or condition might arise. To enter upon such determination would be to transcend the scope and limitations of my official investigation or review, since I could not assume to pass upon either question except upon conditions assumed to be affected by the operation of the laws of this Commonwealth, which plainly must be limited

by their territorial jurisdiction. I cannot presume to limit the inquiry within the bounds above suggested, and must therefore hold that the inquiry, as presented, lies beyond the field of my determination. I adopt this conclusion the more readily since a consideration of the further inquiries submitted to me may permit of my responding to the requirements of the honorable House of Representatives in as full a measure as may be within its contemplation.

In the second inquiry it is stated that my predecessor, Attorney-General Knowlton, in an opinion transmitted to the Senate and House of Representatives March 16, 1894, relating to the New York, New Haven & Hartford Railroad Company, said:—

Acting with full knowledge and acquiescence in the fact that the railroad company it incorporated had already received a similar charter from Connecticut, the Legislature of Massachusetts must be presumed to have conceded, by implication, the right to the consolidated corporation to have and exercise such powers as the State of Connecticut, acting upon matters within its exclusive jurisdiction, should grant to it by virtue of its sovereignty; and to reserve to itself the right to exercise exclusive control over the corporation only as to such matters as should be within its exclusive jurisdiction.

To the inquiry, "Do you concur with these views?" I have the honor to reply that I am in full concurrence with the views of my predecessor above cited. The inquiry continues, assuming such concurrence of opinion:—

Do you or do you not think that the direct or indirect acquisition of all or part of the stock of a Massachusetts street railway corporation by the New York, New Haven & Hartford Railroad Company falls within the jurisdiction of Massachusetts to an extent sufficient to make it illegal in view of the following provision of law? R. L., c. 111, § 77: "No railroad corporation, unless authorized by the general court or by the provisions of the following five sections, shall directly or indirectly subscribe for, take or hold the stock or bonds of or guarantee the bonds or dividends of any other corporation; and the amount of the bonds of one or more other corporations subscribed for and held by a railroad corporation, or guaranteed by it conformably to special authority of the general court or the authority given in said sections, with the amount of its own bonds issued in conformity with sections sixty-three and sixty-four, shall not exceed at any time the amount of its capital stock actually paid in cash."

This inquiry seeks my opinion whether the acquisition of stock upon the hypothesis above stated is illegal. I am of opinion that it is illegal in that it comes within the effective range of the Massachusetts statute which you cite, since it is not a matter within the exclusive jurisdiction of the State of Connecticut to authorize the purchase of stock of a Massachusetts street railway corporation. If I am right in this conclusion, the Attorney-General of this Commonwealth may, by appropriate process, invoke the action of the courts, looking either to the nullification or restraint of the prohibited transaction, or to the forfeiture of the charter of the offending corporation in so far as the same exists by grant of the Commonwealth of Massachusetts.

In the third inquiry, R. L., c. 111, § 62, is cited:—

If a railroad corporation which owns a railroad in this commonwealth and is consolidated with a corporation in another state which owns a railroad therein increases its capital stock or the capital stock of such consolidated corporation, except as authorized by this chapter, without authority of the general court, or without such authority extends its line of road, or consolidates with any other corporation, or makes a stock dividend, the charter and franchise of such corporation shall be subject to forfeiture.

And a portion of the opinion of my predecessor, Attorney-General Knowlton, is quoted, as follows:—

The law amounts to nothing more than a declaration of the policy of the State, and it does not pretend to prohibit, much less to make unlawful, the acts of a consolidated corporation done in another State, and under the lawful authority of the Legislature of that State.

I understand that the statement of facts presented in the order assumes that the opinion last quoted is applicable to acts of the New York, New Haven & Hartford Railroad Company done in Connecticut under the lawful authority of the Legislature of that State; and the inquiry is made:—

What would be the bearing of the law on acts done in either Connecticut or Massachusetts for the purpose of acquiring control of a Massachusetts corporation, such, for instance, as an increase of capital stock to accomplish that purpose directly or indirectly?

I am of opinion that, if such act under inquiry were done in the State of Connecticut by the corporation and by authority of the law of that State, but with the actual purpose of acquiring stock of a Massachusetts corporation in violation of the law of Massachusetts applicable to such transaction, the charter and franchise of the corporation, in so far as they existed by grant of the Legislature of Massachusetts, would thereby be made "subject to forfeiture." *A fortiori* would this conclusion be inevitable if the assumed act with the assumed purpose were done within the State of Massachusetts.

In the fourth inquiry, R. L., c. 126, § 11, is cited:—

If a foreign corporation which owns or controls a majority of the capital stock of a domestic street railway, gas light or electric light corporation issues stock, bonds or other evidences of indebtedness based upon or secured by the property, franchise or stock of such domestic corporation, unless such issue is authorized by the law of this commonwealth, the supreme judicial court shall have jurisdiction in equity in its discretion to dissolve such domestic corporation. If it appears to the attorney-general that such issue has been made, he shall institute proceedings for such dissolution and for the proper disposition of the assets of such corporation. The provisions of this section shall not affect the right of foreign corporations, their officers or agents to issue stock and bonds in fulfillment of contracts existing on the fourteenth day of July in the year eighteen hundred and ninety-four.

And it is added:—

It is currently reported that the Consolidated Railway Company of Connecticut, a foreign corporation, owns or controls a majority of the capital stock of one or more Massachusetts street railway companies.

I assume that it is intended that I shall accept, for the purpose of rendering my opinion, such statement of current report as establishing an existent fact. The inquiry then proceeds:—

If such majority of the capital stock were held by Massachusetts trustees for the benefit of a foreign corporation, would that be tantamount to the control meant by the law?

Confining my answer exactly to such assumed predicates, the accuracy of which I do not attempt to determine, I have the

honor to advise the honorable House of Representatives that in my opinion such a state of facts would disclose the control intended by the phrase of the statute quoted.

I am further required to answer the specific question: —

Does the section last cited establish clearly that it is the policy of Massachusetts not to permit such control unless it is authorized by law?

I entertain grave doubt whether it lies within my province to assume to state what the policy of Massachusetts is or may be upon any question which properly lies within the responsible discretion and declaration of the legislative branch of the government. I may, however, say without presumption that the policy which appears to me to be reflected by existent legislation declares that such control is not to be permitted unless authorized by law.

A further inquiry is propounded, based upon an assumption as follows: —

Assuming such to be the policy of the Commonwealth, what, if any, change should be made in this section to carry that policy into full effect?

If I correctly apprehend the tenor and intent of existing legislation, its policy is manifest, though its phrase is somewhat ambiguous; and, if I may be permitted to proceed upon this assumption of my own, I think there does appear to be occasion for further legislation in this regard. In order to fully answer this inquiry and to render every assistance that any opinion of mine might contribute, I perhaps ought to add that it may be difficult if not impossible to attain the apparent end contemplated by the section of the statute last quoted, through a dissolution of the domestic corporation whose stock has been acquired in violation of the law, because of the difficulty in determining the precise import of the term "based upon" in the section cited, or the proof of a condition falling within its express intent; and legislation removing such doubt of construction or difficulty in proof may be advisable.

SHELLFISH — CULTIVATION — CITY AND TOWN AUTHORITIES —
CLOSE SEASON — PRIVATE RIGHTS.

The clause "*provided*, that no private rights are impaired," in St. 1904, c. 282, § 1, providing that under certain conditions therein set forth "the mayor and aldermen of cities, and the selectmen of towns, when so authorized by their respective cities and towns, may declare from time to time a close season for shellfish . . . in such waters or flats within the limits of their respective cities and towns as they deem proper, and may plant and grow shellfish in such waters and flats: *provided*, that no private rights are impaired . . ." has reference to right of the littoral proprietor to exclude navigation by the erection of wharves or other structures extending to the limit of private ownership; the right to interfere with public use by setting stakes or by keeping back the water by means of a dyke; and the right to fill such flats if duly licensed by the Board of Harbor and Land Commissioners, together with the permission, in the nature of a right when granted, and not incidental to riparian ownership, to engage in the cultivation of shellfish as authorized by R. L., c. 91, §§ 104, 105.

Your communication of April 12 requires my opinion upon the interpretation to be given to the clause "*provided*, that no private rights are impaired," in St. 1904, c. 282, § 1, which provides that under certain conditions therein set forth "the mayor and aldermen of cities, and the selectmen of towns, when so authorized by their respective cities and towns, may declare from time to time a close season for shellfish for not more than three years in such waters or flats within the limits of their respective cities and towns as they deem proper, and may plant and grow shellfish in such waters and flats: *provided*, that no private rights are impaired; . . ."

For the purpose of your inquiry I assume that the term "private rights" has reference to and concerns only the private and exclusive rights in property of an individual, and is applicable as well to the provision of the statute above quoted, which authorizes the mayor and aldermen of cities and the selectmen of towns to declare a closed season for shellfish, as to that which permits them to themselves engage in the planting and cultivation thereof; and upon such assumption I beg to reply as follows.

The private rights enjoyed by a littoral proprietor or owner of flats over flats which are subject to private ownership, either

To the Com-
missioners on
Fisheries and
Game.
1905
May 8.

as being between high and low water mark or between high-water mark and a point one hundred rods seaward, if low-water mark exceeds that distance, and so appurtenant to the upland, or if below the limit applicable to private ownership, as having been at some time the subject of a grant by competent authority, in contradistinction to the general right of the public to fish and boat thereon, comprise the right to exclude navigation by the erection of wharves or other structures extending to the limit of private ownership; the right to interfere with public use by setting stakes or by keeping back the water by means of a dyke; and the right even to fill such flat, if duly licensed by the Board of Harbor and Land Commissioners, and subject to conditions imposed by them. R. L., c. 96.

It is to be observed, also, that there is a further right or permission, in the nature of a right when granted, to engage in the cultivation of shellfish as authorized by R. L., c. 91, §§ 104, 105, which is exercised to the exclusion of the public rights above referred to, and is not necessarily incidental to ownership of flats. This right or privilege must be deemed to be held subject to the paramount right of the Commonwealth, or of the several cities and towns to which its authority in the premises may be delegated, to pass laws regulating the taking of shellfish and establishing a close season for the protection thereof; but, on the other hand, such cities and towns may not, under color of the statute under consideration, and for the purpose of planting and growing shellfish, interfere with the private cultivation of such shellfish by persons in the enjoyment of a license therefor while such license is in force.

MASSACHUSETTS HIGHWAY COMMISSION — REGISTRATION OF AUTOMOBILES.

Under the provisions of St. 1903, c. 473, § 1, the Massachusetts Highway Commission has no discretion, if the application is in proper form, to refuse to register an automobile upon the ground that it is of improper construction, or that it is one which should not be allowed to be operated on the highway.

An automobile the registration of which has been suspended or revoked may not be registered again while owned by him by whom it was owned when such registration was revoked or suspended, so long as such revocation or suspension remains in force; but upon a *bona fide* sale of such machine, and the surrender of the certificate of registration, the new owner is entitled to a new certificate of registration, even though the period of suspension has not expired.

In your letter of the 8th instant you state that the Massachusetts Highway Commission desires my opinion as to whether it can refuse to grant any certificate of registration of an automobile applied for in case an application is made for the registration of a machine which, in the opinion of the Board, is of improper construction, or which is one which should not be allowed to be operated on the highways. You further submit to me the following facts, namely: that the commission recently suspended a certificate of registration of an automobile owned by one Woodruff for a period beginning May 1, 1905, and ending May 31, 1905, both inclusive; and that said Woodruff claims to have sold the automobile, and has returned the certificate of registration; and you request my opinion as to whether the commission can refuse to re-register the machine in the name of the person to whom Woodruff has sold it, until after the expiration of the time during which the right to use it was suspended.

To the Massachusetts
Highway Commission.
1905
May 12.

Acts of 1903, c. 473, § 1, provides: —

All automobiles and motor cycles shall be registered by the owner or person in control thereof in accordance with the provisions of this act. Application for such registration may be made, by mail or otherwise, to the Massachusetts highway commission or any agent thereof designated for this purpose, upon blanks prepared under its authority. The application shall, in addition to such other particulars as may be required by said commission, contain a statement of the name, place of residence and address of the applicant, with a brief description of the automobile or

motor cycle, including the name of the maker, the number, if any, affixed by the maker, the character of the motor power, and the amount of such motor power stated in figures of horse power; and with such application shall be deposited a registration fee of two dollars. The said commission or its duly authorized agent shall then register, in a book to be kept for the purpose, the automobile or motor cycle described in the application, giving to such automobile or motor cycle a distinguishing number or other mark, and shall thereupon issue to the applicant a certificate of registration. Said certificate shall contain the name, place of residence and address of the applicant and the registered number or mark, shall prescribe the manner in which said registered number or mark shall be inscribed or displayed upon the automobile or motor cycle, and shall be in such form and contain such further provisions as the commission may determine. A proper record of all applications and of all certificates issued shall be kept by the commission at its main office, and shall be open to the inspection of any person during reasonable business hours. The certificate of registration shall always be carried in some easily accessible place in the automobile or motor cycle described therein. Upon the sale of any automobile or motor cycle its registration shall expire, and the vendor shall immediately return the certificate of registration to the highway commission, with notice of the sale, and of the name, place of residence and address of the vendee.

I am of opinion that under this statute the commission has no discretion as to the registration of machines, and that it cannot, if the application for registration is in proper form, refuse to register an automobile on the ground that it is of improper construction, or that it is one which should not be allowed to be operated on the highways. To this view I am led by the following considerations:—

First. — The statute provides that, upon the filing of an application in the prescribed form, accompanied by a fee of two dollars, “the said commission or its duly authorized agent *shall* then register . . . the automobile or motor cycle described in the application . . . and *shall* thereupon issue to the applicant a certificate of registration.”

Second. — There is no provision making such registration conditional upon satisfying the commission that the machine is a proper one to be registered; whereas, in the case of licenses to operate, it is expressly provided that “before a license to operate

is granted, the applicant shall pass such examination as to his qualifications as may be required by the state highway commission;" and that in the case of special licenses for the operation of machines for hire "no such licenses shall be issued until the commission or its authorized agent shall have satisfied itself or himself that the applicant is a proper person to receive it." Had the Legislature contemplated an exercise of discretion in the issue of certificates of registration, it might have required the satisfaction of similar conditions precedent thereto.

Third. — The discretion of the Highway Commission in the registration of automobiles is not required in order to give the commission the control over machines which the statute contemplates; since, by § 9, it is authorized to "suspend or revoke a certificate issued under section one of this act, . . . for any cause which it may deem sufficient."

Clearly, however, a machine the registration of which has been suspended or revoked is not entitled to registration while owned or controlled by him by whom it was owned or controlled when the registration was suspended or revoked, so long as such suspension or revocation remains in force; but in the event of a *bona fide* sale of such machine to another, and a surrender of the certificate of registration, such new owner, upon proper application, would, in my opinion, be entitled to a new certificate of registration, even though the period of suspension as against its former owner had not expired.

**STANDARD FIRE INSURANCE POLICY — MORTGAGED POLICY —
REFEREES — APPOINTMENT — INSURANCE COMMISSIONER —
NOTICE.**

Under a fire insurance policy in the Massachusetts standard form required by R. L., c. 118, § 60, where the damaged property is mortgaged and the insurance is payable to the mortgagee, the Insurance Commissioner should not, on the application of the mortgagor, appoint a third referee unless the mortgagee joins in the request for such appointment.

A referee chosen by the mortgagor, without the concurrence of the mortgagee, is not duly chosen, and the Insurance Commissioner should not act upon his request for the appointment of a third referee.

R. L., c. 118, § 60, providing that upon appointment of a third referee the Insurance Commissioner "shall send written notification thereof to the parties," requires such commissioner to notify not only the insurance company and the mortgagor, but also the mortgagee, or the two referees as the representatives of such parties.

To the Insur-
ance Com-
missioner.
1905
May 13.

You have requested my opinion upon the following questions of law relating to proceedings for arbitration under a fire insurance policy in the Massachusetts standard form: —

(1) When the damaged property is mortgaged, and the insurance is payable to the mortgagee, as his interest may appear, is the mortgagee one of the insured in such a sense that the Insurance Commissioner should not, on the application of the party holding the equity, appoint a third referee unless the mortgagee joins in the request for an appointment?

(2) In such case, is a referee of the insured duly chosen so that the Insurance Commissioner may act on his request for the appointment of a third referee, if the mortgagee has not concurred in his selection as referee of the insured by the mortgagor?

(3) What parties are meant in R. L., c. 118, § 60, where it provides that the Insurance Commissioner "shall send written notification thereof to the parties"?

The material part of § 60 is as follows: —

In case of the failure of two referees, chosen, respectively, by the insurance company and the insured, to agree upon and select within ten days from their appointment a third referee willing to act in said capacity, either of said referees or parties may within twenty days from the expiration of said ten days make written application, setting forth the facts, to the insurance commissioner to appoint such third referee; and said commissioner shall thereupon make such appointment and shall send written notification thereof to the parties.

The standard form of policy contains this provision:—

If this policy shall be made payable to a mortgagee of the insured real estate, no act or default of any person other than such mortgagee or his agents, or those claiming under him, shall affect such mortgagee's right to recover in case of loss on such real estate: *provided*, etc.

The effect of such a policy, in which the insurance is made payable, in case of loss, to the mortgagee as his interest may appear, has been described in *Palmer Savings Bank v. Insurance Co. of North America*, 166 Mass. 189, 194, as follows:—

The effect of such a policy is the same as if the mortgagor had taken out the insurance in his own name, and then assigned it to the mortgagee to the extent of his interest, and the insurance company had assented to the assignment and had promised the mortgagee that no act or default of the mortgagor should defeat the right of the mortgagee to recover to the extent of his interest. Under such an assignment, assented to by the company, the mortgagee, in the event of a loss, could maintain an action in his own name to recover to the extent of his interest.

The case held that the mortgagee under such a policy is entitled to maintain an action in his own name.

Harrington v. Fitchburg Mutual Fire Insurance Co., 124 Mass. 126, held that a mortgagee under such a policy is not bound by an adjustment of such a loss made without his knowledge or consent by the assured, the mortgagor, with the insurance company.

I am of opinion, following the authority of these cases, that your questions above quoted must be answered as follows:—

(1) The Insurance Commissioner should not, on the application of the mortgagor, appoint a third referee unless the mortgagee joins in the request for an appointment.

(2) A referee chosen by the mortgagor, without concurrence in his selection by the mortgagee, is not duly chosen, and the Insurance Commissioner should not act upon his request for the appointment of a third referee.

(3) You should send notification of your appointment of a third referee not only to the insurance company and the mortgagor, but also to the mortgagee, or to their respective representatives, the two referees.

The following cases in other States also support this conclusion: *Brown v. Roger Williams Insurance Co.*, 5 R. I. 394; *Bergman v. Commercial Assurance Co.*, 92 Ky. 494 (15 L. R. A. 270); *Georgia Home Insurance Co. v. Stein*, 72 Miss. 943.

CONSTITUTIONAL LAW — VETERANS — BOUNTIES.

House Bill No. 992, entitled "An act to authorize the payment of money to certain veterans of the civil war," providing in § 1 that the persons therein specified shall receive from the treasury of the Commonwealth the sum of \$125, "as a testimonial of the sense that the Commonwealth entertains of his patriotism and faithful service," in effect requires the payment from the public treasury of a sum of money in the nature of bounty to such veterans of the war of the rebellion as have never received bounties, and cannot in principle be distinguished from St. 1904, c. 458. The proposed act is therefore unconstitutional.

To the Senate.
1905
May 15.

I have the honor to acknowledge receipt of the order of the Senate adopted May 10, 1905. requiring my opinion on the following question: —

Are the provisions of the bill, printed as House, No. 992, entitled "An Act to authorize the payment of money to certain veterans of the civil war," as passed by the House of Representatives to be engrossed, constitutional?

The bill provides, in its first section, that: —

Every person not being a conscript or a substitute and not having received a bounty from the Commonwealth, or any city or town therein, who served in the army or navy of the United States to the credit of Massachusetts during the civil war, was honorably discharged from such service, and is living at the passage of this act, shall be paid from the treasury of the Commonwealth the sum of one hundred and twenty-five dollars as a testimonial of the sense that the Commonwealth entertains of his patriotism and faithful service.

Section 2 provides that: —

The treasurer and receiver-general, to meet said payment, is authorized to use not exceeding three hundred and fifty thousand dollars of the

sums received from the United States government by the Commonwealth in payment of expenses incurred by the Commonwealth in connection with the civil war, and said sum shall be set aside by the governor and council for such use from the sums so received before any thereof is paid into the sinking fund under the provisions of chapter four hundred and seventy-one of the acts of the year nineteen hundred and three.

Under St. 1903, c. 471, the sums herein referred to are to be "paid into the treasury of the Commonwealth and transferred to and become a part of such sinking funds held by the Commonwealth for the reduction of the public debt as the treasurer and receiver-general, with the approval of the governor and council, shall deem best for the interests of the Commonwealth." Consequently, the effect of the bill in question, if enacted into law, would be to "take from the treasury . . . money which ultimately can be replaced only by taxation." See *Opinion of the Justices*, 186 Mass. 603, 605. This was said by the justices to be the effect of St. 1904, c. 458; and the statement is equally true of the present bill, although under the latter the sums received are to be used directly "before any thereof is paid into the sinking fund under the provisions of chapter four hundred and seventy-one of the acts of the year nineteen hundred and three," instead of being used in the payment of principal and interest of bonds issued to provide for the payments to veterans, as was the case under the former. I am therefore brought to a consideration of whether it is in the power of the Legislature to tax the people of the Commonwealth to provide money to expend as authorized by the bill which you submit to me.

The justices of the Supreme Judicial Court, in reply to certain questions propounded by the Governor and Council, said that in their opinion (*Opinion of the Justices, supra*) St. 1904, c. 458, which directed the payment "out of the treasury of the Commonwealth" of

the sum of one hundred and twenty-five dollars to every veteran of the civil war living at the date of the passage of this act, not being a conscript or a substitute, who served in the army or navy of the United States to the credit of Massachusetts during the civil war, and who was honorably discharged from such service: *provided*, that he has not received a bounty

from any city or town or from the Commonwealth for such service; and *provided*, that he makes application for the said bounty prior to the first day of November in the year nineteen hundred and six —

was not in conformity with the Constitution of the Commonwealth, since it provided for the expenditure of money for private use.

The question before me is simply whether the present bill can be distinguished from the statute of 1904 in respect to the character of the expenditure provided for therein. The acts are alike in that they provide for the payment from the treasury of the same sum of money, namely, one hundred and twenty-five dollars, to each of the same class of persons, — in general, Massachusetts veterans who have not received bounties. There is a minor difference, in that the later one does not limit the payment to those applying before a given date; but this clearly does not affect the nature of the act. The acts differ in their titles, the title of the earlier being "An Act to provide for the payment of bounties to certain veterans of the civil war," that of the later being "An Act to authorize the payment of money to certain veterans of the civil war." They also differ in the following respect: in St. 1904, c. 458, the payment is referred to as a "bounty;" in House Bill No. 992 it is not referred to as a bounty, but is expressly declared to be made "as a testimonial of the sense that the Commonwealth entertains of his patriotism and faithful service." The other distinctions are either merely differences in form, or such differences in substance as have no bearing on the characterization of the expenditures provided for.

The title of an act is no part of it, although it may be resorted to for explanation when the enacting clause is doubtful. Since, however, the same distinctions are maintained through the acts as appear in their titles, no assistance in interpretation is to be gained in the present case from a comparison of the latter.

The omission of the word "bounty" in the act before me, though of some significance as indicating the legislative intention, does not of itself change the nature of the payments; and, if the payments have the characteristics of bounties, they are

to be treated as such, regardless of the fact that the Legislature has not applied that name to them.

In the opinion given by the justices of the Supreme Judicial Court upon the constitutionality of c. 458 of the Acts of 1904 it was held that:—

In this opinion we need not consider the subject of pensions to soldiers, for the statute does not purport to grant pensions or rewards for meritorious service, or money for the relief of present necessities. It purports to give bounties now only to those who did not receive them at the time of enlistment, which, if given then, would have been given as inducements to enlist in the service of the United States. Under the provisions of this statute, those who enlisted without a bounty, under other influences or upon other inducements, would receive now as a gratuity this sum of money representing an additional inducement. The object of the act, as disclosed by its provisions, is not to give rewards in recognition of valuable services, and thus to promote loyalty and patriotism, but to equalize bounties given to induce enlistments in a particular military service many years ago.

The justices further said: "The manifest object" (of the act) is "to give to soldiers, forty years after their enlistment, bounties similar to those that others had at the time of their enlistment."

The act before me appears likewise to be expressly intended retroactively to equalize bounties given to induce enlistments in a particular military service many years ago. The sole condition upon which the payments under this act are to be made is that upon which an equalizing bounty would of necessity rest. Only those who would have been entitled to a bounty as such, had there been a uniform system therefor, are entitled to the benefits of the enactment before me. Throughout its phrase it is manifest that its purpose is to make a payment which, had it been made at the inception of the service referred to, rather than long years afterward, when both the service and its occasion were long past, would have been in its very essence a bounty, and could not have been otherwise interpreted. The payment contemplated by the act under inquiry appears to me to be no less a bounty, though it be delayed in time of payment and retro-

spective in intent, and though the avowed purpose of the act is, as expressed therein, "a testimonial of the sense that the Commonwealth entertains of patriotism and faithful service." It is to be observed that the testimonial is to be withheld or conferred, dependent upon the decisive incident of a previous payment of the bounty, or the absence of such payment. It appears to me indisputable that the payment contemplated by the act is, and is intended to be, the exact equivalent of a bounty. If I am right in this view, it follows that, notwithstanding some characterizing terms of the act, they are nevertheless of necessity so controlled by its plain terms and its vital provisions as to bring it plainly within the reason and decision of the justices of the Supreme Judicial Court in their opinion upon the former statute above quoted, and by such opinion so held to be unconstitutional, because "the manifest object is to give to soldiers, forty years after their enlistment, bounties similar to those that others had at the time of their enlistment."

A statute duly enacted and approved by Executive authority should be presumed to be constitutional until the courts of competent jurisdiction have otherwise decided; but were there such presumption before final enactment by legislation, it must be overborne by existing judicial authority. Enlightened and instructed as I am by such authority, I hold it to be my official duty to advise the Honorable Senate that the bill printed as House Bill No. 992, entitled "An Act to authorize the payment of money to certain veterans of the civil war," is, in my opinion, unconstitutional.

GYPSEY AND BROWN-TAIL MOTHS — SUPPRESSION AND DESTRUCTION — SUPERINTENDENT — LOCAL BOARDS OF HEALTH — PUBLIC NUISANCE — CITIES AND TOWNS — LOCAL OFFICERS — REIMBURSEMENT — PROPERTY OWNERS.

The provisions of St. 1905, c. 381, "An Act to provide for suppressing the gypsy and brown-tail moths," are not applicable to local boards of health, and such boards cannot take action to suppress such moths in their various stages of development, as constituting a public nuisance.

It is the duty of the Superintendent for the Suppression of Gypsy and Brown-tail Moths to deal with the officers of cities and towns who have been appointed, under color of authority, to act therefor; and he is called upon to determine the legality of such appointments.

St. 1905, c. 381, § 3, does not make compulsory the destruction by cities and towns of gypsy and brown-tail moths within their respective limits; but the reimbursement therein provided for extends to and includes all acts done by such cities and towns, under the advice or direction of the superintendent, for the purpose of destroying such moths.

The superintendent may, under the provisions of St. 1905, c. 381, § 3, within the limits of the appropriation provided therein, suppress gypsy and brown-tail moths within a city or town which has made the maximum expenditure authorized by such act, and may employ the local force therefor, or organize a new force of agents or employees under his immediate control. Such superintendent may also organize a force, and undertake the work of suppressing and destroying such moths, in cities and towns refusing to prosecute the work required by such statute.

St. 1905, c. 381, § 5, does not require property owners to undertake any work against the "caterpillars" of the gypsy or brown-tail moth.

In your letter of May 20 you request my opinion upon certain questions relative to c. 381 of the Acts of 1905, entitled "An Act to provide for suppressing the gypsy and brown-tail moths."

To the Superintendent for Suppressing the Gypsy and Brown-tail Moths.
1905
May 25.

Your first question is as follows: —

The common method of suppressing public nuisances is by action of the local board of health. Do such boards still have authority to act against the moth plague?

It is extremely doubtful if the local boards of health had any authority to destroy gypsy and brown-tail moths before the passage of this statute. The act clearly does not confer upon the local boards of health, as such, any additional authority to destroy moths. Furthermore, in my opinion it shows a legislative intention to limit proceedings for the destruction of moths as public nuisances to such as are provided for by the act itself.

I must therefore advise you that the local boards of health cannot suppress moths in their various stages of development as public nuisances.

Your second inquiry is in regard to the authority of cities and towns to designate or appoint public officers or boards to act for them in the suppression of gypsy and brown-tail moths. I am of opinion that it is the duty of the superintendent to deal with the officers of the cities and towns who have been, under color of authority, designated or appointed to act for such municipality, and that it is not a part of his duty to determine the legality of appointments and designations under which municipal officers or boards are acting in the premises. It appears, therefore, unnecessary now to ascertain by what method the municipal appointments are to be made. That question would appropriately arise upon the issue of the right to reimbursement for expenditures.

The third, fourth, fifth and sixth questions relate to the interpretation of the third section of the act. I am of opinion that this section does not make compulsory the destruction by cities and towns of the caterpillar of gypsy and brown-tail moths. I am, however, of opinion that the reimbursement to which a city or town is entitled under the second sentence of this section extends to all acts done by a city or town under the advice and direction of the superintendent in the suppression of gypsy and brown-tail moths, including the destruction of caterpillars, the clause of the provision relating to reimbursement being obviously broad enough to justify such inclusion, and making a distinction from the more limited provision with respect to the compulsory requirement of this section.

The seventh inquiry is as follows: —

When a city or town has made the maximum expenditure required under the provisions of this act, and the necessities of the case demand further work, is this work to be continued by the local force at the State's expense, or can the superintendent organize a force of his own to carry it on if he deems necessary? (See § 5.) Does § 3 confer this authority?

I am of opinion that, under authority conferred by the third section of the act upon the superintendent to "enter upon the

land of the commonwealth or of a municipality, corporation or other owner or owners," and to "use all reasonable means in carrying out the purposes of this act," and to "in the undertakings aforesaid," "in accordance with the provisions of this act, expend the funds appropriated or donated therefor," the superintendent may, within the limits of the appropriation provided by the act, suppress gypsy and brown-tail moths within a city or town which has made the maximum expenditure; and that the superintendent may in his discretion employ the local force, or organize a new force of agents or employees under his own immediate control. There is, however, no provision in the act by virtue of which the superintendent can compel a city or town to act after it has made the maximum expenditure.

The eighth inquiry is as follows: —

Should a city or town refuse to do any work against the moth, is the superintendent empowered to organize a force, and attend to it? (See § 5.) Does § 3 confer this authority?

Under the language of § 3, above quoted, the superintendent may, in my opinion, organize a force and attend to the work of suppressing and destroying the moth in towns refusing to prosecute the work in accordance with the requirements of the statute.

The ninth inquiry is substantially whether, in view of the omission in § 6 of the word "caterpillars," work against caterpillars can be required of property owners under the terms of the section. This question must be answered in the negative. The general purpose of the statute is the suppression of the gypsy and brown-tail moths; but the particular requirement in the sixth section does not include the destruction of caterpillars, and there is nothing in the section which renders the inclusion of caterpillars by implication necessary, though I believe the omission to have been the result of inadvertence rather than design.

The tenth and eleventh inquiries relate expressly to disbursements to be made by the Commonwealth, and, since they do not fall within the official determination and responsibility of the superintendent, do not need to be dealt with by him.

CLERKS OF COURT — ASSISTANT CLERKS — TRAVELLING EXPENSES — ALLOWANCE.

Under St. 1904, c. 451, § 6, providing that clerks of courts and assistant clerks of courts "shall be allowed . . . their travelling expenses necessarily incurred when holding sessions of said courts out of the cities or towns in which they severally reside," the allowance for such expenses must be limited to expenses so incurred when the court is actually in session, and cannot include travelling expenses of a clerk or assistant clerk when engaged upon other duties than attendance upon a session of court.

To the Con-
troller of
County
Accounts.
1905
June 6.

You request my opinion as to whether the clerk of courts for the county of Norfolk, and the assistant clerk, are entitled to their daily travelling expenses from their home in Weymouth to Dedham, and return.

The facts are, that the clerk resided, when elected, and still resides, in the town of Weymouth, and that the assistant clerk is also a resident of such town. The courts of the county are held at Dedham, and no sessions thereof are held outside of said town.

St. 1904, c. 451, § 6, is as follows:—

The clerks of courts and assistant clerks of courts shall each be allowed by the respective counties in which said courts are established their travelling expenses necessarily incurred when holding sessions of said courts out of the cities or towns in which they severally reside, which expenses shall be audited by the county commissioners.

The natural interpretation of this statute is that the clerk of courts or the assistant clerk, as the case may be, shall be allowed, when actually holding a session of court at Dedham, his travelling expenses necessarily incurred in going back and forth from his home in Weymouth. Such allowance for travelling expenses must, however, in my opinion, be limited to the days when the court is actually in session, and to the clerk or assistant who is actually in attendance on such court. The statute cannot be extended to include the travelling expenses of a clerk or assistant clerk when he is engaged in the performance of any duties of his office other than attendance upon a session of the court.

SAVINGS BANKS — INVESTMENTS — FIRST MORTGAGE OF REAL ESTATE.

A transaction by which a person borrows money of a savings bank upon his personal note, pledging as collateral therefor certain mortgage notes secured by real estate within the Commonwealth, and assigned to such bank and duly recorded, the mortgagee still continuing to receive the interest upon the mortgage notes, is not an investment in first mortgages of real estate within the meaning of R. L., c. 113, § 26, cl. 1, permitting savings banks to invest deposits and income in "first mortgages of real estate situated in this commonwealth."

My opinion is desired by the Board of Commissioners of Savings Banks upon the proper classification of a loan, made as hereafter described, by a savings bank within the Commonwealth and subject to the jurisdiction of the Board, such loan being now carried upon the books of the bank as a "loan on mortgage of real estate."

To the Board
of Savings
Banks Com-
missioners.
1906
June 7.

Chapter 113 of the Revised Laws, which treats "of savings banks and other institutions for savings," provides in § 26 for the investment of deposits and income derived therefrom; and, so far as material to the present issue, is as follows:—

First, In first mortgages of real estate situated in this commonwealth, not to exceed sixty per cent of the valuation of such real estate; but not more than seventy per cent of the whole amount of deposits shall be so invested. A loan on mortgage shall not be made except upon the report of not less than two members of the board of investment, who shall certify, according to their best judgment, to the value of the premises to be mortgaged and such report shall be filed and preserved with the records of the corporation.

The facts, as they appear in the communication of the Board, are, that "a certain party borrowed \$20,000 of this institution, and pledged as collateral to the same certain mortgage notes aggregating \$40,000. Each mortgage note which is held as collateral is secured by real estate located in this Commonwealth, and each mortgage is assigned to the bank and duly recorded." I am further advised that it may be assumed, for the purposes of this inquiry, that the \$20,000 above mentioned was advanced upon the personal note of the borrower, and that, notwithstand-

ing the assignment of the mortgages to the bank, the mortgagee still continues to receive the interest upon the mortgage notes deposited as collateral for the principal loan, the profit to the bank from the transaction being derived from the payments of interest upon the obligation of the borrower.

Upon this assumption of fact I am of opinion that the transaction which is the subject of this inquiry is not an "investment in first mortgages of real estate," within the meaning of R. L., c. 113, § 26, cl. 1. This section contemplates a complete assignment to the bank of the several mortgages, which should have effect to vest in the latter the full and unrestricted rights of a mortgagee in the premises. 1 Op. Atty.-Gen. 434, 436. In the present case, however, the bank could not, upon default in the payment of interest upon the note of the borrower, at once exercise the rights of a mortgagee to foreclose or to sue upon the mortgage notes, but would be forced to proceed against the maker of the original note for recovery upon that obligation. It follows, therefore, that the present undertaking lacks one of the essential features of a loan upon a mortgage of real estate, and should not be so recorded.

GYPSY AND BROWN-TAIL MOTHS — SUPPRESSION AND DESTRUCTION — CITIES AND TOWNS — GROSS AMOUNT OF EXPENDITURES — REIMBURSEMENTS — CONTIGUOUS LANDS.

St. 1905, c. 381, § 5, defines the gross amount which the Superintendent for the Suppression of the Gypsy and Brown-tail Moths may require cities and towns to expend for the purposes set forth in such statute, and no deductions are to be made on account of reimbursements.

Lands owned by one owner on two sides of a public highway are contiguous within the meaning of St. 1905, c. 381, § 6, providing that when, in the opinion of the mayor, or selectmen, the cost of destroying eggs, pupæ and nests of gypsy or brown-tail moths "on lands contiguous and held under one ownership in a city or town" will exceed one-half of one per cent of the assessed value of such lands, a part of such lands only may be designated for such purpose.

To the Superintendent for
Suppressing
Gypsy and
Brown-tail
Moths.
1905
July 15.

Your letter of June 22 requests my opinion upon two questions relative to the construction of St. 1905, c. 381.

The first question is, whether § 5 of that act defines the gross amount that cities and towns are required to expend in suppress-

ing gypsy and brown-tail moths, or whether it refers to the net expenditure that they are required to make, — taking into consideration the reimbursements that may be made to them by the Commonwealth under § 4 of that act.

Section 5 is as follows: —

When, in the opinion of the superintendent, any city or town is not expending a sufficient amount for the abatement of said nuisance, then the superintendent shall, with the advice and consent of the governor, order such city or town to expend such an amount as the superintendent shall deem necessary: *provided*, that no city or town where the assessed valuation of real and personal property exceeds six million dollars shall be required to expend during any one full year more than one fifteenth of one per cent of such valuation, and that no town where the assessed valuation of real and personal property is less than six million dollars shall be required to expend during any one full year more than one twenty-fifth of one per cent of such valuation. For the purposes of this section the valuation of the year nineteen hundred and four shall be used.

Any city or town failing to comply with the directions of the said superintendent in the performance of said work within the date specified by him shall pay a fine of one hundred dollars a day for failure so to do; said fine to be collected by information brought by the attorney-general in the supreme judicial court for Suffolk county.

I am of opinion that this section limits the gross amount that cities and towns may be required to expend. The language of the section is very clear, and, except for the fact that certain reimbursements are allowed by § 4, I conceive that there would be no doubt as to its meaning.

It is to be noted that the word “expended” is used several times, both in § 4 and in § 5. The obvious intent of these two sections is that cities and towns whose assessed valuation of real and personal property exceeds six million dollars may be required to make a gross expenditure during any one full year of one-fifteenth of one per cent. of their valuation; those whose assessed valuation is less than six million dollars may be required to make a gross expenditure of one twenty-fifth of one per cent. of such valuation. This does not limit them in the amount which they may expend if they so desire, because, by § 4, in towns whose valuation is less than six million dollars the Commonwealth pays all of the expense of suppressing the moths

over and above one twenty-fifth of one per cent. of the assessed valuation of the property in such town. Then the statute provides that:—

Disbursements made by said named towns in excess of one twenty-fifth of one per cent shall be reimbursed by the Commonwealth every sixty days.

This obviously presupposes that the town may, in its discretion, expend more than it can be legally required to expend, in which case the Commonwealth reimburses it for all it expends over one twenty-fifth of one per cent. of its assessed valuation.

So, in the case of other cities and towns where the valuation is more than six million dollars, there is no limit upon the authority of such towns and cities to expend by this act, but the Commonwealth will reimburse them only a portion of what they expend above a certain amount.

Furthermore, § 5 is in the nature of a penal statute, a fine of one hundred dollars a day being imposed for failure to comply with the directions of the superintendent, and is therefore to be construed strictly.

For all of these reasons I am of opinion that § 5 defines the gross amount which cities and towns may be required to expend by you, and that no deductions are to be made on account of reimbursements.

Your second question is, whether lands owned by one owner on two sides of a public highway are contiguous or not, within the meaning of § 6, which provides that:—

When, in the opinion of the mayor or selectmen, the cost of destroying such eggs, pupæ and nests on lands contiguous and held under one ownership in a city or town shall exceed one-half of one per cent of the assessed value of said lands, then a part of said premises on which said eggs, pupæ or nests shall be destroyed may be designated in such notice, and such requirement shall not apply to the remainder of said premises. The mayor or selectmen may designate the manner in which such work shall be done, but all work done under this section shall be subject to the approval of the state superintendent.

I am of opinion that lands so held are contiguous within the meaning of the above provision.

EXECUTIVE COUNCIL — DELEGATION OF AUTHORITY TO APPROVE WARRANTS.

The Executive Council may not delegate to one of its members the authority to advise with and consent to the acts of the Governor, in the approval of warrants for the payment of money from the treasury of the Commonwealth.

In your letter of the 20th instant you request my opinion as to whether the Executive Council can delegate its authority to approve warrants for the payment of employees of the Commonwealth under substantially the following vote: —

To the
Treasurer
and Receiver-
General.
1906
July 24.

Voted, That during the month of August the Council delegate to any member of the committee on warrants or finance the right to approve for and in behalf of the Council all warrants for the expenditure of money duly certified by the Auditor, and ordered by His Excellency the Governor.

The Constitution, part second, c. II., § I., art. XI., provides: —

No moneys shall be issued out of the treasury of this commonwealth, and disposed of (except such sums as may be appropriated for the redemption of bills of credit or treasurer's notes, or for the payment of interest arising thereon) but by warrant under the hand of the governor for the time being, with the advice and consent of the council, for the necessary defence and support of the commonwealth; and for the protection and preservation of the inhabitants thereof, agreeably to the acts and resolves of the general court.

The duty hereby imposed upon the Executive Council of approving the warrants for the payment of money is executive in character.

The Constitution provides, part second, c. II., § III., art. I., for a council "for advising the governor in the executive part of the government." The approval of warrants requires the exercise of judgment and discretion, and is not a mere ministerial or mechanical function. Duties requiring the exercise of judgment and discretion cannot be delegated by public officers or boards upon whom they are imposed.

The court, in *Commonwealth v. Smith*, 141 Mass. 135, stated the principle which is here applicable; and there is no distinc-

tion to be drawn from the fact that in that case the officer in question was a statutory officer, while the Executive Council derives authority from the Constitution.

The general rule is that the performance of public duties cannot be delegated by public officers; and the reasonable inference is that, unless there is a clear expression in the statutes to the contrary, the Legislature intended that public duties requiring the exercise of discretion should be performed by public officers selected for that purpose with a view to the intelligent and discreet discharge of such duties.

It is consequently my opinion that the Council cannot delegate to one of its members the authority to advise with and consent to the acts of the Governor in the approval of warrants for the payment of money from the treasury of the Commonwealth.

GOVERNOR AND COUNCIL — CLAIM AGAINST THE UNITED STATES
— AUTHORITY TO APPOINT AGENT OF COMMONWEALTH FOR
COLLECTION.

Under R. L., c. 6, § 79, authorizing the Governor, with the advice and consent of the Council, to appoint from time to time an agent to examine and prosecute before any of the executive departments of the United States government any accounts or claims of the Commonwealth against the United States, except claims for reimbursement of interest on war loans, the Governor and Council are not warranted in making a contract with any person to act as agent of the Commonwealth in the "collection" of a claim against the United States, since such statute does not authorize the appointment of an agent to present or prosecute before the courts or to actually collect such claim.

To the Com-
mittee on
Finance of
the Executive
Council.
1905
July 25.

I respectfully acknowledge Your Honor's communication of July 20, in which you require the opinion of the Attorney-General upon the authority of the Council to authorize the employment of a special agent in Washington to collect money due the State of Massachusetts from the United States.

R. L., c. 7, § 1, is as follows: —

The attorney general shall appear for the commonwealth, the secretary, the treasurer and receiver general, the auditor of accounts and for state boards and commissions in all suits and other civil proceedings in which

the commonwealth is a party or interested, or in which the official acts and doings of said officers are called in question, in all the courts of the commonwealth, except upon criminal recognizances and bail bonds; and in such suits and proceedings before any other tribunal when requested by the governor or by the general court or either branch thereof. All such suits and proceedings shall be prosecuted or defended by him or under his direction. Writs, summonses or other processes served upon such officers shall be forthwith transmitted by them to him. All legal services required by such officers, boards, commissions and commissioner of pilots for the harbor of Boston in matters relating to their official duties shall be rendered by the attorney general or under his direction.

The law so provides that the Attorney-General shall appear for State boards and commissions, and in all proceedings in which the Commonwealth is a party or interested, in all courts of the Commonwealth except in certain particular cases not here material; and that the Attorney-General further shall appear in all suits and proceedings before any tribunal other than those of this Commonwealth when requested by the Governor or by the General Court or either branch thereof, and that in all such cases the Attorney-General or those acting under his direction shall conduct the prosecution or defence.

It thus appears that absolute and specific provision is made, whereby the Attorney-General must represent the Commonwealth in all matters affecting its interests, save for the exceptions above noted, in the courts of this Commonwealth, and these duties are expressly and exclusively delegated and committed to him. He is further required, at the request of the Governor, to act or direct action in the interests of the Commonwealth before any tribunals outside of the Commonwealth. The plain intent of the law appears to be that the Attorney-General shall be responsible for the conduct of all litigation in which the State, as such, is concerned.

R. L., c. 7, § 9, provides that the Attorney-General —

may appoint such assistants as the duties of the office require; and with the approval of the governor and council shall fix their compensation. If in his opinion the interests of the commonwealth so require, he may, with the approval of the governor and council, employ additional legal assistance.

Ample provision is thus made for the conduct of all litigation in the interests of the State, or the prosecution before any tribunal of any claim in its behalf, whereby the same shall remain in the responsible official charge of the attorney of the Commonwealth, who may, if occasion arises, with the approval of the Governor and Council, employ assistants in other jurisdictions to care for issues and conditions there arising. Such assistant, of necessity, still remains under the responsible direction of the Attorney-General, who, in turn, is responsible to the Commonwealth, whose sworn officer he is.

By the provisions of the law above cited, it is plain that the Governor may request the Attorney-General to act in the premises suggested by Your Honor's communication; and it appears, as well, that the Attorney-General, without such requirement, may so act, and with the approval of the Governor and Council secure such additional legal assistance as any occasion may require. There does not appear to me reason for any action outside of that thus above provided for.

R. L., c. 6, § 79, —

The governor, with the advice and consent of the council, may from time to time appoint an agent to examine and prosecute before any of the executive departments of the United States government, any account or claim of the commonwealth against the United States, except any claim for reimbursement of interest paid by the commonwealth on its war loans; and if any amount is received into the treasury of the commonwealth by reason of the services rendered by such agent he may be paid in full compensation for services and expenses such sum, not exceeding ten per cent of the amount so received, as may be agreed upon in advance between the governor and council and such agent —

confers authority upon the Governor, with the advice and consent of the Council, to appoint from time to time an agent to examine and prosecute before any of the executive departments of the United States government any account or claim of the Commonwealth against the United States, except any claim for reimbursement of interest paid by the Commonwealth on its war loans.

The authority of an agent, if so appointed, is thus limited

to the prosecution of a claim before the executive departments of the United States government, and confers no authority to collect any claim, nor for the presentation or prosecution of a cause before the courts; and is thus confined to a mere detail of prosecution, and does not extend to the effectual and necessary end of an adjudication in the courts, or an adjudication and appropriation by the Congress.

The communication of Mr. Tolford, to which Your Honor calls my attention, solicits his appointment as agent of the Commonwealth to collect the claims referred to. He gives very confident assurances that, if so appointed, in three or four weeks he could obtain settlements from the government and have returned to the State treasury the greater part of the amount outstanding and still due Massachusetts. He does not state where or before what tribunals or by what methods he proposes to accomplish such immediate results. He could have no authority to speak or act for the State of Massachusetts under such appointment as is contemplated by the statute above cited, except before the executive departments of the Federal government; and if the situation is such as to justify his assurances, there must be an inconceivable delay or failure in the adjustment of claims by the Federal officials, who, it must be assumed from Mr. Tolford's statement, have authority to make, and are required to make, immediate payment, but have failed to do so.

The contract suggested by Mr. Tolford, in regard to which Your Honor's inquiry is directed, is one conferring exclusive authority to proceed to collect claims not yet adjudicated, and which may be, as matter of law, disputed, and necessarily involve judicial determination.

I have the honor to advise the committee of the Council that in my opinion the Governor and Council have no authority to make a contract of such tenor or conferring such authority. At most, any contract made by the Governor and Council without further legislative authority must be absolutely confined to the examination and prosecution of claims or accounts before the executive departments of the United States government, — a limited field of action, within which no conclusive results could

be attained; and any amounts of money received into the treasury of the Commonwealth thereafter could be attributed only in part, if at all, to any service thus rendered.

In my opinion, by reason of the provisions of the section of the Revised Laws last quoted, the limited contract for services before the executive departments of the United States may be entered into by the Governor and Council; but such authority is not broad enough to authorize the making of a contract as suggested in the letter of Mr. Tolford; and Your Honor's view appears to me to be entirely in accord with the law, in which you have held that affirmative action by the Legislature is a necessary prerequisite to the making of such a contract of appointment. Mr. Tolford's proposition is for the making of a contract authorizing him to collect by whatever processes, disclosed or undisclosed, may be requisite, claims and accounts of the State of Massachusetts; whereas, the statute above referred to limits the authority of the Governor and Council to the appointment of an agent to examine and prosecute accounts before the departments above referred to.

Having indicated the limitation of authority in the matter of appointment of an agent for the Commonwealth, I ought to add that it is not possible for me to express an opinion as to whether a particular contract is authorized or unauthorized, until I should have opportunity to examine it in its detail of statement. For the moment I can go no farther than to hold that, in my opinion, a contract such as that suggested in the communication of Mr. Tolford would be beyond the scope of the authority of the Governor and Council.

By reason of the duties imposed upon this office, I deem it not inappropriate to respectfully suggest to Your Honor and the Executive Council some considerations applicable to the contemplated action in the employment of an agent. I cannot, as the law officer of the Commonwealth, assume that a claim of one of the States against the Federal government, indisputably due and capable of instant demonstration, must fail of recognition or payment unless some individual, assuming to have a peculiar knowledge, capacity or influence in the premises, is employed as a representative of the Commonwealth,

upon a basis which gives such solicitor or intermediary an interest in the amount so to be recovered. To assume any such condition is to suggest an incomprehensible failure of, or inattention to, duty on the part of the representatives of the Federal government, if it does not further suggest a characterization of much more serious import. I can adopt no such assumption. The claims of the Commonwealth outstanding must be either valid and demonstrable, as matter of fact and law, or they are not so; if the former, they are susceptible of proof, and of satisfaction through the presentation of the case by any competent and reliable attorney. Nor is there any reason apparent or discoverable by me that would justify the appointment of an agent upon the considerations suggested by Mr. Tolford. I know of no reputable or legitimate method of prosecuting legitimate causes except through the employment of attorneys who are content to be paid for such services as may be actually rendered, rather than to be made joint speculators with the client in prosecuting claims whose recognition, according to the suggestions of Mr. Tolford, depends upon the person through whom they are presented. If conditions such as Mr. Tolford assumes do actually obtain, and if the necessity for employment such as he solicits actually exists, there is occasion for investigation of such alleged system, to the end that the debts due from the United States may be paid as other ascertained or ascertainable debts are paid.

Were a contract or appointment to be made upon the predicates of Mr. Tolford, I respectfully suggest that, instead of insisting upon the recognition of her rights, and instead of aiding the Federal authorities in directly meeting their obligations, the State would be condoning, participating in and recognizing a system admittedly objectionable and to be deplored. And, again, I respectfully submit for the consideration of the Honorable Council that the employment of alien agents by the Commonwealth, upon the basis of a contingent interest in the amount to be recovered, is, in my judgment, absolutely inconsistent with the attitude which the Commonwealth ought to assume. For services rendered she is amply prepared to make immediate and full payment. She need not stimulate a mercenary activity

or fidelity in her employees through the hope of speculative rewards; nor does she need to confess misgivings as to the validity of a claim through hesitation to make the legitimate expenditures necessary for its presentation.

In summing up, I have the honor to respectfully advise the committee of the Council that, in my opinion, the contract as outlined in the communication of Mr. Tolford, transmitted to me, cannot lawfully be entered into by the Governor and Council; and that, if a contract should be drafted in accordance with the limitations of authority prescribed by the statutes, even then I am of opinion that it would be inconsistent with the interests of the Commonwealth, and wholly at variance with that public policy manifest in legislation, that commits to the law officer of the Commonwealth the responsible charge over litigation in which her interests are involved.

Though it appears that the satisfaction of the accounts and claims of this State for expenditures in the Spanish war has been long delayed, I have not been advised by the Governor that such delay required any specific action by this department. Immediately upon receipt of such request, it would have had my immediate attention; and, if it became advisable or necessary to secure legal assistance for the presentation and prosecution of the claim, I would at once seek the approval of the Governor and Council for the appointment of such assistant. Indeed, I respectfully suggest that, if there be occasion for such special legal assistance, it would be, in my judgment, best secured by the employment of an attorney to give attention to the interests of the State at Washington, either upon the basis of an annual salary, or upon some fixed rate of compensation for services rendered. In this manner every detail of legal attention that a claim of the Commonwealth might require would be in charge of a competent attorney, acting under and responsible to the law department of this Commonwealth, and constantly reporting upon all matters of which the officers of this Commonwealth should be advised.

CAUCUS — PRECEDENCE OF TWO POLITICAL PARTIES — CALL
 • FOR CAUCUS — FILING WITH SECRETARY.

A communication from the chairman of a State committee of a political party, stating that, at a meeting of the executive committee of such State committee, it was voted to hold caucuses of such party upon a specified date throughout the Commonwealth, does not comply with the requirements of R. L., c. 11, § 88, providing that no two political parties shall hold caucuses upon the same day, and that the first filing with the Secretary of the Commonwealth a copy of the call, as provided for in § 87, shall be entitled to precedence on the day named, if it appears that no record was made of any vote to issue a call for caucuses, and that no copy of any such call was transmitted to the Secretary, or that no such call was in fact ever issued.

I have the honor to acknowledge your communication of July 24, with copies of the communications therein referred to. You inquire, first, "as to what constitutes a call within the meaning of § 87 of c. 11 of the Revised Laws;" and second, "Which of the two political parties, Democratic or Republican, is entitled to the date mentioned, — September 26?"

To the
Secretary.
1905
July 26.

R. L., c. 11, § 87, provides: —

All caucuses of political parties, except for special elections, for the choice of delegates to political conventions which nominate candidates to be voted for at the annual state election, and for the nomination of candidates to be voted for at such election, shall be held throughout the commonwealth on a day designated by the state committee of the political party for which said caucuses are held; and all of said delegates shall be elected, and all of said candidates shall be nominated, at one caucus. Such caucuses shall be held at the call of the state committee of the political party whose caucuses are to be held, and the chairman and secretary of the state committee of each political party shall, at least twenty-one days before the date on which the caucuses are to be held, forward a copy of the call, with designation of date, to the chairman and secretary of each city and town committee of their party.

Section 88 provides: —

No two political parties shall hold such caucuses on the same day. The party first filing with the secretary of the commonwealth the copy of the call as above provided shall be entitled to precedence on the days named.

Section 87 provides that all caucuses of political parties, except for special elections, for the choice of delegates to political

conventions which nominate candidates to be voted for at the annual State election, and for the nomination of candidates to be voted for at such election, shall be held throughout the Commonwealth on a day designated by the State committee of the political party for which said caucuses are held. It is further provided that such caucuses shall be held at the call of the State committee of the political party whose caucuses are to be held.

Section 88 provides that no two political parties shall hold such caucuses on the same day, and that the party first filing with the Secretary of the Commonwealth the copy of the call as above provided shall be entitled to precedence on the day named.

The call for such caucuses must be made by the respective State committees. The legal designation of the days for such caucuses can be made only by filing with the Secretary of the Commonwealth the copy of the call for such caucuses as above specified; and the party first filing such copy of the call is entitled to precedence on the day named therein, to the exclusion of the designation of such day by any subsequent filing.

It appears, from the copies of communications transmitted to me, that a notice signed "Arthur Lyman, Chairman of the Democratic State Committee," bearing date May 23, was received at the office of the Secretary of the Commonwealth on the 27th of May. This communication states that, at a meeting of the executive committee of the Democratic State committee, it was voted to hold Democratic caucuses throughout the Commonwealth on Tuesday, September 26, 1905. It appears that no record was made of any vote of such committee to issue a call for caucuses, nor was there any copy of any such call transmitted or communicated to your department, nor does it appear that any such call was ever, in fact, issued.

I am of opinion, therefore, that the communication of May 23 does not comply with the requirements of § 88, and does not, therefore, make any designation of the date therein referred to which could be held to have any lawful precedence as against the lawful designation of such date thereafter certified to you by another political party.

The copies of the communications from the chairman of the Republican State committee and of the certified call for Republican caucuses do appear to me to strictly comply with the requirements of the statute; and I am of opinion that the filing of such copy of the call and of the notice accompanying the same constitutes the first filing of the designation of a day for caucuses, as contemplated by § 88; and that the date, September 26, therein designated, excludes the designation of the same date by another political party. It follows, therefore, that in my opinion the designation of a date as specified in the communication from the Republican State committee does give precedence to that party in the matter of assigning that date; and that the communication from the Democratic State committee in the premises cannot give any right to that party to hold its caucuses upon the twenty-sixth day of September; and that for the purposes of your consideration and action the communication of Mr. Lyman, chairman of the Democratic State committee, must be held to be inoperative.

I have advised the officers of the two political parties interested in your inquiry of its pendency, and have given such representatives opportunity to offer such considerations as they might desire before rendering my official opinion; and I am in receipt of a communication from the chairman of the executive committee of the Democratic State committee, in which he advises me that "the Democratic State committee does not desire to press its claim for the date for which it gave notice to the Honorable Secretary, the date not appearing to it to be material. As I am informed the Republican party desires September 26, we will waive our claim and fix another date." It would thus seem that the notice heretofore filed in your department by the chairman of the Democratic State committee may, at his suggestion, be considered as withdrawn and no longer in issue.

FOOD — ADULTERATION — INDICATION OF ANTISEPTIC OR PRESERVATIVE SUBSTANCES — BEER AND MALT BEVERAGES.

R. L., c. 75, § 18, providing that food as defined by the statute shall be deemed to be adulterated if it contains any added antiseptic or preservative substance except those therein enumerated, "but the provisions of this definition shall not apply to any such article if it bears a label on which the presence and the percentage of every such antiseptic or preservative substance are clearly indicated," is applicable to beer and other malt beverages, whether sold for consumption upon the premises or for removal for consumption elsewhere.

To the State
Board of
Health.
1905
July 26.

The secretary of the State Board of Health requests the opinion of the Attorney-General upon the question whether, under the provisions of c. 75 of the Revised Laws, it is permissible to sell beer and other malt beverages containing added antiseptic substances, without marking the can, glass or other vessel in which the said articles are sold, either for consumption on the premises or to be taken away for consumption elsewhere.

Section 16 of c. 75 provides that: —

No person shall manufacture, offer for sale or sell, within this commonwealth, any drug or article of food which is adulterated within the meaning of section eighteen.

Section 17 defines the term "food" as including —

all articles, simple, mixed or compound, used in food or drink by man.

Section 18 provides that food shall be deemed to be adulterated —

if it contains any added antiseptic or preservative substance, except common table salt, saltpetre, cane sugar, alcohol, vinegar, spices, or, in smoked food, the natural products of the smoking process; but the provisions of this definition shall not apply to any such article if it bears a label on which the presence and the percentage of every such antiseptic or preservative substance are clearly indicated, . . .

Beer and other malt beverages are clearly "food," within the meaning of the word as above defined. There is therefore nothing in the nature or character of beer and malt beverages to exclude them from the application of the statute. It is equally clear that the sale of beer and other malt beverages is a sale

within the meaning of the statute, whether the article be consumed on the premises or taken away for consumption elsewhere.

The restrictions of the statute are applicable both to the offering for sale and to a sale itself. Either transaction must respond to the requirements of the statute, or be unlawful. A sale of the beverages under consideration to be drunk upon the premises involves or comprises only the quantity of the beverage set apart and defined in the sale itself, and may be held to be physically limited to the beverage contained in the vessel in which it is sold. And from these predicates it must follow, in my opinion, that the vessel containing the beverage so sold must bear a label on which the presence and percentage of the antiseptics or preservative substances referred to in the statute are clearly indicated.

Considering a sale as I have, and as I think the question submitted requires me to, it cannot, if the beverage contains the substances to which the prohibition refers, find immunity from the fact that the receptacle from which the beverage is drawn before the sale exhibits the label required by the statute; much less would such immunity obtain if such receptacle and the draught therefrom be not, at the time of the sale, visible and open to the observation and notice of the purchaser.

The same line of reasoning and the same conclusion must of necessity attach to a sale in a can or other vessel, not to be consumed at the place of sale, but put up for transportation.

I cannot doubt that the intent of the Legislature was actually that which appears to me to be manifest in the provision above referred to, and to require visible and obvious notice to the purchaser, in every sale, of the fact that antiseptic or preservative substances are used in the beverages which are the subject of the sale.

The plain intent of the Legislature would, in my opinion, fail, if it were held sufficient for the protection of the sale at retail that the receptacle from which the subject of such sale was drawn set forth the requisite label, even though such label, or notice of the existence of such substance in the beverage sold,

was in no wise called to the attention of the purchaser and so a sale be made, the purchaser being entirely in ignorance as to the quality or character of the beverage which he bought.

PEDLERS' LICENSES — TRANSFER — FEE.

The Secretary of the Commonwealth is not authorized to charge a fee for the transfer of pedlers' licenses issued under the provisions of R. L., c. 65, § 19, providing for the licensing of persons "to go about exposing for sale and selling any goods."

To the
Secretary.
1905
July 31.

In your letter dated July 13 you request my opinion as to whether you are authorized by any provision of law to charge a fee for the transfer of pedlers' licenses issued under the provisions of c. 65 of the Revised Laws.

R. L., c. 65, § 19, provides that: —

The secretary of the commonwealth may grant a license to go about exposing for sale and selling any goods. . . . The secretary shall cause the names of such cities and towns as the applicant designates, with the amounts to be paid to the respective treasurers thereof, as herein provided to be inserted in every such license, and shall receive from the applicant one dollar for each city and town so inserted. The licensee may sell in any city and town mentioned in his license any goods, wares or merchandise, not prohibited in section fourteen, upon payment to the treasurer thereof of the following fees: [Here follows a schedule of fees.] The secretary may grant as aforesaid special state licenses upon payment by the applicant of fifty dollars for each license; . . .

Section 20 provides that: —

The secretary may also grant as aforesaid, special county licenses, upon payment by the applicant of one dollar for each county mentioned therein; and the licensee may expose for sale within such county any tin, . . . upon paying to the treasurer of such county the amounts following: . . .

Section 22 provides that: —

A license granted under the provisions of section nineteen may be transferred by the secretary, upon application therefor and upon evidence furnished by the applicant like that required for granting a license. The transferee shall thereafter be liable in all respects as if he were the

original licensee, and no person shall thereafter sell under such license except the person named in such transfer.

There is no provision in terms for a fee for the transfer authorized by § 22. Furthermore, the transfer of a license, transferable from its inception, does not have any of the incidents of a new or original issuance, and therefore cannot be considered as being in any sense a new license, or as entailing the payment of the established fee for such issuance.

R. L., c. 204, § 33, provides: —

The fees of public officers for any official duty or service shall, except as otherwise provided, be at the rate prescribed in this chapter for like services.

The only services of the Secretary of State referred to in this chapter are the furnishing of copies and the Secretary's certificate (§ 27), and the examination of records or papers and the copying of them (§ 28). The services of the Secretary of State in transferring pedlers' licenses is not, in my opinion, "like" to such services, and the fee for such transfer is not regulated thereby.

Chapter 204 fixes, also, the fees of justices of the peace, and police, district, municipal courts and trial justices, clerks of courts, sheriffs, deputy sheriffs and constables, jurors, witnesses, appraisers, commissioners, etc., town clerks and ministers, registers of deeds and probate and insolvency, notaries public and commissioners in other States. In no case, however, is a fee fixed for the transfer of a license of any kind, nor for anything which in my opinion is "like" the transfer of a pedler's license. It follows that the fee for the transfer of a pedler's license is not fixed by c. 204.

Since express provision is made in the statute for a fee for the issuing of a pedler's license, which from the moment of its issuance carries a right of transference, and since no provision is made for a fee for such transfer, I think none can be imposed by implication.

I must therefore advise you that in my opinion you are not authorized to charge a fee for the transfer of pedlers' licenses.

SHERIFF — SUPPLIES FOR PRIVATE USE — EXPENSE —
COUNTY.

The sheriff of Norfolk County, who also acts as master of the house of correction therein, is not entitled to have all necessary provisions for himself and his family furnished by and at the expense of such county.

To the Con-
troller of
County
Accounts.
1905
August 17.

In accordance with your request, I submit my opinion upon the question whether or not the sheriff of Norfolk County is entitled to have all necessary provisions for himself and family furnished by and at the expense of the county.

By R. L., c. 23, § 18, the salary of the sheriff of Norfolk County is fixed at \$1,800. Section 20 of the same chapter requires the payment over by him to the treasurer of the county of all fees and money received by virtue of his office. From these provisions it is clear that the sum of \$1,800 is intended to be in full compensation for services performed in person by the sheriff of Norfolk County within his county. See *Briggs v. Taunton*, 110 Mass. 423, 424. It is equally clear that a sheriff as such is not entitled to receive provisions for himself and his family, upon the ground that the cost of such provisions is a necessary expense incurred in the performance of his official duty.

The sheriff of a county, under the provisions of R. L., c. 224, § 16, has —

the custody and control of the jails in his county and, except in the county of Suffolk, of the houses of correction therein, and of all prisoners who may be committed thereto, and shall keep the same himself or by his deputy as jailer, master or keeper and shall be responsible for them. . . .

I am further informed that in Norfolk County the sheriff is himself the master of the house of correction; and it follows, therefore, that by reason of R. L., c. 23, § 19, an additional compensation not exceeding \$1,000 may be received by him for his services as master of the house of correction. The exact amount of the compensation established by law for such services is fixed in accordance with R. L., c. 224, § 18:—

The county commissioners shall establish fixed salaries for all officers, assistants and employees of jails and houses of correction, which shall be in full compensation for all their services, and for which they shall devote their whole time, not exceeding the time limited by the provisions of section twenty, to the performance of their duties, unless released therefrom by the commissioners.

The amount established in accordance with this provision is the maximum amount which may be paid for such services, and is in full compensation therefor. As compensation for his services as master of the house of correction, therefore, the sheriff of Norfolk County is not entitled to receive from the county sufficient provisions for himself and his family.

R. L., c. 224, § 28, is as follows:—

The county commissioners shall, except in the county of Suffolk, without extra charge or commission to themselves or to any other person, procure or cause to be procured all necessary supplies for the jails and houses of correction, to be purchased and provided under their direction and at the expense of the county.

The question whether or not, under the provisions of this section, the master of a house of correction may not be entitled to necessary provisions for himself and his family, upon the ground that such provisions are included within the "necessary supplies" for the house of correction provided for, is a question of more difficulty. The duties of a master of a house of correction are such as to render it desirable, if not absolutely necessary, that he reside at the institution; and that the Legislature intended such residence, and intended further that the county should provide accommodations for him within the institution, is clearly evidenced by R. L., c. 224, § 8, which authorizes the "county commissioners in each county, except Dukes County . . ." "at the expense of the county," to—

provide a house or houses of correction, suitably and efficiently ventilated, with convenient yards, workshops and other suitable accommodations adjoining or appurtenant thereto, for the safe keeping, correction, government and employment of offenders who may be legally committed thereto by the courts and magistrates of this commonwealth or of the United States—

taken in connection with R. L., c. 224, § 17, which provides that: —

He [the sheriff] shall not receive any rent or emolument from the jailers and keepers of the houses of correction for the use and occupation of the dwelling houses which are provided for them by the county.

The dwelling houses thus furnished may, in my opinion, include reasonable accommodations for the family of the master, since the difficulty of obtaining a person capable of performing the duties required of a master of a house of correction would be much enhanced if, in order to take such position, it should be necessary for him to separate from his family. It does not, however, follow, from the fact that the master of a house of correction may by law be provided with a dwelling house in which he and his family may reside at the expense of the county, that he is entitled to be provided with all necessary provisions for the maintenance of his family and himself therein; and where the master conducts an establishment for himself and his family entirely distinct and separate from the house of correction itself, I am of opinion that the term "all necessary supplies" is not to be construed to include provisions for such establishment. On the other hand, R. L., c. 225, § 7, contains at least an intimation that certain supplies may, in accordance with law, be furnished to the master for private consumption. This section in part provides that: —

Each jailer and master of a house of correction shall have a prison book, in which he shall keep an account of the value of the labor of the prisoners, of the salaries of officers and of articles furnished for the support of the prisoners, the quantity of such articles, of whom bought and the price paid, classified as follows: cost of provisions, including the portion consumed by the family of the jailer or master; . . .

This classification in substantially its present form is first found in St. 1859, c. 139, § 5. An earlier statute, St. 1848, c. 276, § 2, required that a book account should be kept of all articles furnished for the support of prisoners. At the time of the enactment of St. 1859, c. 139, the master or keeper of a

house of correction was paid for the support of prisoners; and the prison book was thus of importance, as indicating what would be an adequate compensation for such support. See *Adams v. County of Hampden*, 13 Gray, 439. Shortly after the passage of the above statute, however, St. 1859, c. 249, was enacted, providing, in § 4, that the county commissioners should provide or cause to be provided supplies for houses of correction (see R. L., c. 224, § 28 *et seq.*); and therefore the reason which previously existed for the keeping of the prison book no longer obtained. Whatever may have been the original reason for the keeping of such records, however, it appears that the Legislature contemplated that the supplies furnished for the several houses of correction should include certain supplies for the household of the master; and that, to the extent indicated, such officer is entitled to receive provisions at the expense of the county.

I am, however, clearly of the opinion that the master of a house of correction is entitled to receive only from the supply provided for the use of prisoners, such as are to be procured by the county commissioners under authority of R. L., c. 224, § 28. The language of R. L., c. 275, § 7, moreover, indicates that the provisions to be consumed by the family of the master are incidental, and there exists no specific authorization for the buying of provisions solely and expressly for the master and his household. Provisions to be consumed by them may be taken from the general supply; but the implied authority to use such supply is not to be construed so broadly as to permit the purchase of any provisions for the exclusive use of the master and his family. In other words, the sheriff of Norfolk County, who also acts as master of the house of correction therein, is not entitled to have all necessary provisions for himself and his family furnished by and at the expense of the county.

EMPLOYMENT OF CHILDREN — FACTORY, WORKSHOP OR MERCANTILE ESTABLISHMENT.

The provisions of R. L., c. 106, § 28, as amended by St. 1905, c. 267, does not permit the employment of children under the age of fourteen years in any factory, workshop or mercantile establishment, nor any other employment of children of such age during the hours when the schools of the cities and towns of their residence are in session.

To the Chief
of the Massa-
chusetts
District Police.
1905
August 17.

Your communication of June 30 requires my opinion upon certain questions relative to the interpretation to be given to R. L., c. 106, § 28, as amended by St. 1905, c. 267. The section above referred to, as amended by St. 1905, c. 267, is as follows: —

SECTION 28. No child under the age of fourteen years and no child who is over fourteen and under sixteen years of age who does not have a certificate as required by the following four sections certifying to the child's ability to read at sight and to write legibly simple sentences in the English language shall be employed in any factory, workshop or mercantile establishment. No child under the age of fourteen years shall be employed at work performed for wages or other compensation, to whomsoever payable, during the hours when the public schools of the city or town in which he resides are in session, or be employed at work before six o'clock in the morning or after seven o'clock in the evening.

The specific questions upon which my opinion is required are: —

First. — Does the act as amended permit of the employment of children under the age of fourteen, providing they have the qualifications for reading and writing as specified by said chapter?

Second. — Does the law permit of a child under fourteen years of age working in a factory, workshop or mercantile establishment when the schools are in session?

I assume that in the first of the questions above quoted the word "employment" is to be understood to relate only to employment in any factory, workshop or mercantile establishment; and upon such assumption I am of opinion that it must be answered in the negative. The obvious purpose of the amendment is to make further and additional opportunity for the education of children, by creating, in addition to children under the age

of fourteen who may not under any circumstances be employed in the establishments specified, another class of children, between fourteen and sixteen, who may not be so employed until they have acquired the prescribed proficiency in reading and writing. Such construction, moreover, is in accord not only with the plain purpose of the statute, but also with the general and well-recognized rule of statutory construction, — that a limiting clause is to be confined in its application to the last antecedent, unless the subject-matter of the act requires a different construction. *Cushing v. Worrick*, 9 Gray, 382; *Keening v. Ayling*, 126 Mass. 404; *Commonwealth v. Kelley*, 177 Mass. 221.

The language of R. L., c. 106, § 28, as amended by St. 1905, c. 267, is in itself decisive of the second question, which must be answered in the negative. The concluding paragraph of said section appears clearly to relate to employment other than employment in a factory, workshop or mercantile establishment, and at hours which neither conflict with the regular sessions of the schools, nor impose too great a tax upon the strength and endurance of a child in attendance upon them, who may, by necessity, be required to perform labor of some character other than that forbidden by the section, after school hours.

GYPSEY AND BROWN-TAIL MOTHS — SUPERINTENDENT — RULES AND REGULATIONS — INFESTED CORD WOOD.

Under St. 1905, c. 381, § 3, authorizing the Superintendent for Suppressing Gypsy and Brown-tail Moths to "make rules and regulations," such superintendent is not authorized to make rules and regulations requiring owners about to transport cord wood infested with the gypsy moth to have such cord wood examined and treated before transportation, his power in the premises being limited to the establishment of rules and regulations for the examination by his agents of all cord wood in an infested district, and the destruction of any nests found therein before such wood may be transported.

You inquire whether, under the authority of St. 1905, c. 381, § 3, you are authorized to make a rule or regulation requiring persons who have cord wood infested with the gypsy moth to have the same examined and the gypsy moth nests treated

To the Superintendent for Suppressing the Gypsy and Brown-tail Moths.
1905
August 23.

before it is allowed to be transported. You also inquire whether, in the event that such a rule is authorized, the penalty set forth in § 11 of the statute above cited will be applicable to cases where such rule or requirement is neglected.

The powers vested in the Superintendent for Suppressing Gypsy and Brown-tail Moths by St. 1905, c. 381, § 3, are very broad:—

SECTION 3. The said superintendent shall act for the Commonwealth in suppressing said moths as public nuisances, in accordance with the provisions of this act. For this purpose he shall establish an office and keep a record of his doings and of his receipts and expenditures, and may make rules and regulations. He may employ such clerks, assistants and agents, including expert advisers and inspectors, as he may deem necessary and as shall be approved by the governor. He may make contracts on behalf of the Commonwealth; may act in co-operation with any person, persons, corporation or corporations, including other states, the United States or foreign governments; may conduct investigations and accumulate and distribute information concerning said moths; may devise, use and require all other lawful means of suppressing or preventing said moths; may lease real estate when he deems it necessary, and with the approval of the board in charge, may use any real or personal property of the Commonwealth; may at all times enter upon the land of the Commonwealth or of a municipality, corporation, or other owner or owners, and may use all reasonable means in carrying out the purposes of this act; and, in the undertakings aforesaid, may, in accordance with the provisions of this act, expend the funds appropriated or donated therefor; but no expenditure shall be made or liability incurred in excess of such appropriations and donations.

I am of opinion that the rules and regulations contemplated by this section are rules and regulations governing the conduct of the agents under your charge, and that it cannot be invoked for the imposition of any new or affirmative requirement upon the owner of property infested by the gypsy moth, which is not specifically provided for by its terms. The statute, in § 6, confers authority upon cities and towns to require land owners at their own expense to destroy gypsy and brown-tail moths and the nests of such moths found upon their premises; and in the event of neglect so to do, the agents of the city or town may enter upon the infested property for the purposes of co-operat-

ing in such destruction, the reasonable expense of which may be assessed upon the owner.

It is to be observed, however, that the penal provisions of § 11 do not apply to the refusal or neglect of a property owner to destroy the moth, but only to resistance to or obstruction of some officer, agent or servant engaged in the work of suppression. I am of opinion that your power and authority in the premises must be limited to the making and promulgation of rules and regulations which may require your agents to inspect all cord wood in an infested district, and the destruction of any nest which may be found before such cord wood is transported elsewhere by the owners.

SAVINGS BANKS — LEGAL INVESTMENTS — BONDS OF THE BANGOR & AROOSTOOK RAILROAD COMPANY.

Consolidated refunding mortgage bonds of the Bangor & Aroostook Railroad Company, issued under a general refunding mortgage, which was a first mortgage as to a part of the road of such company, but was subject to prior outstanding mortgages as to the remainder, are not first mortgage bonds within the meaning of R. L., c. 113, § 26, par. third, cl. a, authorizing savings banks to invest "in the first mortgage bonds of a railroad company incorporated in any of the New England states," under the conditions therein set forth and such bonds are not a legal investment for savings banks in this Commonwealth.

Your letter of September 30 requests my opinion as to the legality of the consolidated refunding mortgage 4s of the Bangor & Aroostook Railroad Company as investments for savings banks in Massachusetts. I understand your inquiry is prompted by the fact that at least one savings bank in Massachusetts has already purchased some of these bonds.

To the Board
of Savings
Banks Com-
missioners.
1906
October 9.

R. L., c. 113, § 26, par. third, cl. a, authorizes savings banks to invest —

in the first mortgage bonds of a railroad company incorporated in any of the New England states and whose road is located wholly or in part in the same, whether such corporation is in possession of and is operating its own road or has leased it to another railroad corporation, and has earned and paid regular dividends of not less than three per cent per annum on all its issues of capital stock for the two years last preceding such investment.

I understand that the Bangor & Aroostook Railroad Company is in possession of and operates its road, and that it has earned and paid dividends so as to bring its bonds within the above section.

The only question is, whether or not the bonds are first mortgage bonds. The mortgage under which they are issued is a general refunding mortgage. It authorizes a total issue of bonds to the amount of \$20,000,000, \$12,500,000 of which may be issued for the purpose of purchasing and refunding outstanding bonds on different divisions of the road and for purchasing the roads of other railroad companies; \$3,000,000 may be issued for acquiring additional property appurtenant to the existing railroad of the mortgagor and for providing improvements upon and equipment of its railroad; and \$4,500,000 may be issued to extend the property of the mortgagor or of its branches. I am advised that bonds amounting to \$5,589,000 have already been issued. Under the terms of the mortgage, \$1,500,000 of this amount may have been issued for improvements upon and equipment of the existing road. The mortgage is a first mortgage on 75.62 miles of the company's road; and on the balance of the system, which is about 336 miles, there is one prior outstanding mortgage, and on a large part of it there are two. The consolidated mortgage provides that all the bonds issued under it shall be equally and ratably secured, without preference, priority or discrimination on account of time or times of the issue of such bonds, or any of them, so that all such bonds at any time outstanding shall have the same lien, right and privilege under and by virtue of the mortgage, and shall be equally secured thereby. These bonds are not first mortgage bonds. They are third mortgage bonds as to a part of the road. The fact that provision is made in the mortgage for ultimately refunding all the prior outstanding indebtedness of the company does not make them first mortgage bonds. If, before such refunding takes place, the company should default its interest on the bonds secured by this mortgage, and the mortgage should be foreclosed and the property sold, it would be sold subject to the prior mortgages. If, on the other hand, the prior mortgages were foreclosed for default in payment of the interest thereon,

the bonds issued thereunder would be paid in preference to these bonds. These will not be first mortgage bonds until the bonds issued under the prior mortgages have been paid and canceled and the mortgages discharged. They are not, therefore, legal investments for savings banks in Massachusetts.

INTOXICATING LIQUORS — REGISTERED PHARMACIST — CO-PARTNERSHIP — ALCOHOL — TRANSPORTATION.

- R. L., c. 100, § 22, providing that "a registered pharmacist who owns stock of the actual value of at least five hundred dollars in a corporation which has been incorporated for the purpose of carrying on the drug business, and who conducts in person the business of a store of such corporation, shall be considered as actively engaged in business on his own account, and as qualified to receive a license for such store," is not applicable to a copartnership.
- R. L., c. 100, §§ 49 and 50, regulating the transportation of "spirituous or intoxicating liquor," extend to and include alcohol.

You request my opinion upon the following question: —

Does the law making it necessary for a registered pharmacist to own \$500 worth of stock in an incorporated company, the remaining stockholders not being pharmacists, in order to do a drug business (R. L., c. 100, § 22), apply to a copartnership, the remaining copartners not being registered pharmacists?

To the Board
of Registration
in Pharmacy.
1905
October 16.

R. L., c. 100, § 22, is as follows: —

No license for the sale of spirituous or intoxicating liquor, except of the sixth class, shall be granted to retail druggists or apothecaries. One or more licenses of the sixth class shall be granted annually by the licensing board of cities, or by the mayor and aldermen of cities having no such board, or by the selectmen of towns, to retail druggists or apothecaries who are registered pharmacists actively engaged in business on their own account, upon presentation to the licensing board of the certificate of fitness prescribed by the following section, if it appears that the applicant is a proper person to receive such license, and is not disqualified to receive it under the provisions of sections fifty-three and fifty-four. A registered pharmacist who owns stock of the actual value of at least five hundred dollars in a corporation which has been incorporated for the purpose of carrying on the drug business, and who conducts in person the business of a store of such corporation, shall be considered as actively engaged in business on his own account and as qualified to receive a license for such store.

I have no hesitation in saying that the section quoted does not apply to a copartnership. It applies only to a registered pharmacist owning stock in a corporation, and a copartnership is not a corporation. The specific qualification by ownership of stock in a corporation, as demonstrating an active business under the statute, is not shown by ownership of an interest — even if held to be of like financial value — in a copartnership.

You also request my opinion as to whether the law governing the transportation of intoxicating liquors in no-license towns applies to the transportation of alcohol. The law governing the transportation of liquors in no-license towns is as follows. R. L., c. 100, §§ 49 and 50: —

SECTION 49. Spirituous or intoxicating liquor which is to be transported for hire or reward for delivery in a city or town in which licenses of the first five classes are not granted, shall be delivered by the seller or consignor to a railroad corporation or to a person or corporation regularly and lawfully conducting a general express business, in vessels or packages plainly and legibly marked on the outside with the name and address, by street and number, if there be such, of the seller or consignor, and of the purchaser or consignee, and with the kind and amount of liquor therein contained. Delivery of such liquors or any part thereof by a railroad corporation, by a person or corporation regularly and lawfully conducting a general express business or by any other person to a person, other than the owner or consignee, whose name is marked by the seller or consignor on said vessels or packages, or at any other place than is thereon marked, shall be deemed to be a sale by any person making such delivery to such person in the place in which such delivery is made.

SECTION 50. Every railroad corporation and every person or corporation regularly and lawfully conducting a general express business, receiving spirituous or intoxicating liquor for delivery, or actually delivering intoxicating liquor to any person or place in a city or town described in the preceding section, shall keep a book, and plainly enter therein the date of the reception by it or him of each vessel or package of such liquor received for transportation, and a correct transcript of the marks provided for by said section, and the date of its delivery by it or him, and the name of the person to whom it was delivered shall be signed to the same as a receipt; and said book shall at all times be open to the inspection of the officers named in section twenty-seven. Such officers shall not make public the information obtained by such inspection except in connection with the enforcement of law.

The precise point in issue is, whether the phrase "spirituous or intoxicating liquor" is to be construed as including alcohol. R. L., c. 100, § 2, defines "intoxicating liquor" as follows:—

Ale, porter, strong beer, lager beer, cider, all wines, any beverage which contains more than one per cent of alcohol, by volume, at sixty degrees Fahrenheit, and distilled spirits, shall be deemed to be intoxicating liquor within the meaning of this chapter.

"Distilled spirits" includes alcohol, and the fact that alcohol is not more specifically referred to is immaterial. The same fact is true of gin, brandy, whiskey and rum. If further evidence were necessary to prove that it was intended to include alcohol in the provisions of this chapter, it is furnished by § 18, in the classification of licenses, which provides for a seventh-class license for the sale of alcohol. The term, having been once defined in the beginning of a chapter, is to be construed as holding the same definition throughout the chapter; and, since there is nothing in §§ 49 and 50, above quoted, either expressly or impliedly excepting alcohol from the provisions applying to other spirituous or intoxicating liquor, and since there seems to be no reason on grounds of public policy for giving the statute a different interpretation than that indicated, I am of opinion that the second question must be answered in the affirmative.

CIVIL SERVICE — SUPERINTENDENT OF THE WATER DEPARTMENT OF THE CITY OF CHICOPEE.

The office of superintendent of the water department of the city of Chicopee, created and defined by St. 1897, c. 239, § 45, such superintendent being the chief executive officer of the water department, and representing it throughout its jurisdiction, is, by the express provisions of civil service rules, schedule B, class 11, exempted from the operation of the civil service law and rules.

St. 1897, c. 239, "An Act to revise the charter of the city of Chicopee," provides in § 45 that:—

To the Civil
Service Com-
mission.
1905
October 18.

The board of water commissioners shall annually in the month of February appoint a superintendent of the water department, who shall not

be one of their own number, who shall hold office for the term of one year from the first Monday in March next ensuing and until his successor is elected, unless sooner removed, and who shall perform such duties as may be required by ordinance; and such further duties as said board may from time to time require. Said superintendent may be removed by said board at any time for cause, and his compensation shall be determined by the board of aldermen. The members of said board shall serve without compensation.

It appears that there is a vacancy in the office of superintendent of the water department as above previously established, and that the question has arisen as to whether or not such superintendent is to be included within the list of the classified civil service, under class 11 of schedule B, which is as follows:—

Class 11. Superintendents, assistant superintendents, deputies and persons, other than the chief superintendents of departments, performing any of the duties of a superintendent in the service of any city of the Commonwealth.

The duties of the officer to be appointed are said to be substantially as follows:—

The superintendent also acts as water registrar, and has entire supervision of the department. He has a clerk, who is subject to his orders and under his control.

The superintendent has the entire charge and the care of all construction and extension work and of all repairs and management of the work of the department. He has authority to dig up the streets and highways for the purpose of laying and repairing lines of water pipes in mains, and while so doing must protect and guard said streets and leave them in satisfactory condition. He cares for all defects in highways or streets caused by leaks in water mains or pipes, and repairs all defective hydrants.

In the discharge of the foregoing duties he has the absolute hiring and discharging of all persons employed by the department.

He purchases all materials, supplies, coal and other merchandise, and performs all duties of an officer who has entire and general charge of a department.

I am of opinion that the superintendent of the water depart-

ment, charged with the duties and exercising the authority above outlined, must be considered to be a chief superintendent of a department, within the exemption in class 11, schedule B of the civil service rules above quoted. The water commissioners of the city of Chicopee clearly constitute a department of the city government (see *Attorney-General v. Trehy*, 178 Mass. 186, 194), and the superintendent is the chief executive of such department, acting for and representing it throughout its jurisdiction.

In an opinion dated June 27, 1901, dealing with the provision in schedule B of civil service rules now under consideration, the term "chief superintendent of a department" was said to designate "an official who has the oversight and charge of the whole of the business of that department, with full power, direction and management. He must be one who acts for and represents the head of the department in every branch of its authority." In accordance with the definition so established by my predecessor, with which I entirely concur, I must advise you that the superintendent of the water department of the city of Chicopee must be considered to be the chief superintendent, and, as such, specifically exempted by the terms of the provision of the civil service rules above quoted.

VETERINARY MEDICINE — REGISTRATION — CERTIFICATE — ISSUANCE BASED UPON MISREPRESENTATION OR ERROR — REVOCATION.

The Board of Registration in Veterinary Medicine may revoke a certificate of registration in veterinary medicine, issued under the provisions of St. 1903, c. 249, § 3, if it clearly appears that such certificate, by reason of misrepresentation or error, was issued in a case where the facts did not warrant such issuance.

You request my opinion as to what action the Board of Registration in Veterinary Medicine can take upon the following statement of facts. The Board issued a certificate of registration in veterinary medicine to an applicant, upon such applicant swearing that he had practised veterinary medicine for six years.

To the Board
of Registration
in Veterinary
Medicine.
1905
November 6.

The Board, by reason of evidence received since the certificate was granted, is now of opinion that the applicant either swore to what he knew to be false, or else that what the applicant considered to be the practice of veterinary medicine was not, strictly, such practice; and that such applicant had not, when the certificate was issued, practised veterinary medicine the required number of years.

The certificate of registration in the present case was issued under authority of St. 1903, c. 249, § 3, which is as follows: —

Said board shall notify all persons practicing veterinary medicine in this Commonwealth of the provisions of this act by publishing the same in one or more newspapers in this Commonwealth, and every such person who is a graduate of a recognized school of veterinary medicine, and also every person who has been a practitioner of veterinary medicine in this Commonwealth for a period of three years next prior to the passage of this act, shall, upon the payment of a fee of two dollars, be entitled to registration, and said board shall issue to him a certificate thereof signed by its chairman and secretary. Registration under the provisions of this section shall cease on the first day of September in the year nineteen hundred and four. All applications for registration under this act shall be made upon blanks furnished by the board, and shall be signed and sworn to by the applicant.

Section 6 provides that: —

It shall be the duty of said board to keep a register of all practitioners qualified under this act, which shall be open to public inspection, and to make an annual report to the governor.

Section 7 provides that: —

It shall be unlawful after the first day of September in the year nineteen hundred and four for any person to practice veterinary medicine, or any branch thereof, in this Commonwealth who does not hold a certificate issued by said board.

I am of opinion that, assuming that the Board is correct in its opinion, it can revoke or annul the certificate of registration in question. That a license to engage in a given occupation is revocable for cause, is clear. *Calder v. Kurby*, 5 Gray, 597. Registration and the issuing of a certificate under the statute

above quoted is a form of licensing. The sole question here, then, is whether the authority to revoke or annul a certificate of registration issued under the provisions of § 3 is conferred upon the Board of Registration in Veterinary Medicine. It is true that the Board is not expressly authorized to revoke such certificates. It is also true that the Board has no discretion in the issuing of them. If certain facts exist, the applicant for registration is entitled to registration and a certificate thereof. Clearly, the authority granted to the Board is not sufficient to raise an implication of power to revoke the certificate on grounds arising after the certificate was issued. I am, however, of opinion that the power to revoke or annul a certificate wrongly issued is implied. Such revocation or annulment amounts merely to the correction of an error. The applicant received something to which he was not entitled, — something which the Board of Registration, if it had known the facts, would have had no right to issue. He cannot complain if that to which he never had or never could have a right be taken from him. The condition precedent to the issuing of a certificate is the existence of certain facts, not a finding by the Board that such facts exist. The assumption which is involved in the issuing of a certificate as to the existence of these facts is not an adjudication which cannot be reviewed.

There is a clear indication that the Legislature intended that a person in the position of the man in question should not be registered. There is nothing in the statute to indicate that the Legislature intended that a certificate wrongly issued should be irrevocable. It seems, therefore, that the Legislature must have intended to give the Board power to revoke or annul a certificate, if, through error or misrepresentation, it issued one in a case where the facts did not warrant it.

As to whether or not a certificate issued upon insufficient facts is in effect until revoked or annulled by the Board, I express no opinion.

It is probable that the license fee, in the case of revocation or annulment of a certificate, should be returned. See *Calder v. Kurby*, *supra*.

TAX ON CORPORATE FRANCHISE — ASSESSMENT — APPEAL —
PARTY AGGRIEVED — CITIES AND TOWNS.

Under R. L., c. 14, § 65, establishing a Board of Appeal from the decision of the Tax Commissioner in the assessment of taxes upon corporate franchises, and providing that "any party aggrieved" by a decision of such commissioner, as therein specified, may, within ten days after notice of his decision, appeal to such Board, a city or town has no such interest in the assessment of the tax in question as to constitute it a "party aggrieved" within the meaning of the statute above cited.

To the Board
of Appeal.
1905
December 5.

The Board of Appeal in tax matters requests my opinion upon the following matter. The Springfield Street Railway Company was assessed a tax by the Tax Commissioner at the rate of \$175 per share; the Tax Commissioner certified the amount of the tax to the Treasurer of the Commonwealth, and thereupon the Springfield Street Railway Company paid its tax to the Commonwealth and took a receipt; subsequently, the Board of Appeal received notice of appeal from the decision of the Tax Commissioner, such appeal being taken by various cities which would share in the distribution of the tax, those cities claiming that the tax was assessed too low. The question is, whether the cities have a right to appeal from the Tax Commissioner's decision.

The statute is R. L., c. 14, § 65:—

The treasurer and receiver general, the auditor of accounts and a member of the council to be designated by the governor, shall constitute a board of appeal. Any party aggrieved by a decision of the tax commissioner made under the provisions of section twenty-two or of sections twenty-four to sixty-two, inclusive, and any party aggrieved by any other decision of the tax commissioner upon any matter arising under the provisions of this chapter from which an appeal is given, may apply to the board of appeal within ten days after notice of his decision. Said board shall hear and decide the subject matter of such appeal and give notice of the decision to the tax commissioner and the appellant; and its decision shall be final and conclusive, although payments have been made as required by the decision appealed from. Any over-payment of tax determined by decision of said board of appeal shall be reimbursed from the treasury of the commonwealth.

The language, "any party aggrieved by a decision of the tax commissioner," is very broad, yet its effect must be measured by

the purpose of the Legislature, its intent and its context. In any question of the valuation of stock pending before the Tax Commissioner it is necessary to determine, for the purposes of the present inquiry, who the parties are, by their own right or by representation, in the matter of the assessment of the stock. It is true, in a general sense, that the cities and towns which are to receive distributive shares of the tax are so ultimately interested in its assessment; but their interests are in fact and in law represented by the Tax Commissioner himself, who is an official of the Commonwealth, and acting as well for all the cities and towns. I am led to the opinion that cities and towns cannot be held to have such independent and direct interest in the assessment of the tax as to bring them within the phrase of the statute as "a party aggrieved," every right or interest of theirs in the premises being entrusted to the Tax Commissioner, as their representative. I test the proposition further by a suggested analogy in another field.

By the statutory provision under consideration the towns and cities are entitled only to a proportionate part of the tax as assessed, — much or little, as the case may be, — commensurately diminishing or increasing the municipal financial resources. Such an ultimate interest appears to me to be like in kind with that of every tax payer of any municipality, who would find his own burden of taxation, since it is proportioned to the entire tax assessed and to that paid by other tax payers, diminished or increased by the assessment levied on any one or more of his fellow tax payers; yet no one would urge that any tax payer has any such interest in the individual assessments upon others as would enable him, as of right, to appeal from the assessment of the tax upon such other individual, alleging as a ground that because such assessment was too low his own obligation was correspondingly and unlawfully increased. I can see no difference in principle between the presented case of the municipality and the Tax Commissioner, and that of the individual tax payer and the local assessors.

Unless an actual legal interest appears to have been impaired, invaded or affected, there can be no such grievance as will sup-

port a right of appeal and a legal inquiry thereon. A municipality cannot, therefore, in my opinion, be recognized as a party appellant, upon the ground that it is a party aggrieved within the contemplation of the statute. If a city or town be held to be a party aggrieved, it would lead to the following result under this statute. A city appeals, and applies to the Board of Appeal. There is no provision for notice to the assessed corporation, and no opportunity given it to be heard, though it is vitally interested in the decision from which an appeal is taken; then the Board of Appeal, after deciding the appeal, is required by statute to give notice of the decision only to the Tax Commissioner and the appellant, — that is, in our supposed case, to the city or town. It appears to me a necessary inference from the machinery of this statute that the Legislature intended to allow appeals only by the corporation, it being the only real party interested.

Since I have come to this conclusion, it is unnecessary to consider the second question asked by the Board, namely, whether the appeals by the cities and towns were filed within the time contemplated by the statute.

It is further to be observed that there is no provision in the statute for notice to the cities and towns of the amount of tax assessed. How, then, can the cities and towns appeal within the ten days required by § 65, unless they keep a representative in the office of the Tax Commissioner to watch; and from what time does the period of ten days extend? If only after actual knowledge by the would-be appellee, the validity of an assessment might be kept in suspense and subject to revision for a period not to be limited even by years. Such a possible result must be held to exclude the predicate from which it would follow.

OPINIONS UPON APPLICATIONS FOR LEAVE TO FILE
INFORMATIONS IN THE NAME OF THE
ATTORNEY-GENERAL.

ATTORNEY-GENERAL v. JAMES E. SMITH AND OTHERS.

*Information in Equity — Right to take Fish from the Sea —
Attorney-General.*

The Attorney-General will not sign an information in equity for the enforcement of a penal statute.

Nor will he sign one asking for an injunction restraining the owners of a steam fishing vessel from using seines and nets in taking fish in the vicinity of Nantucket; for, if the right to take fish from the sea is common to all, it is without restriction as to the amount of fish taken and the methods employed.

This was an application to the Attorney-General for the filing ¹⁸⁹⁹ of an information by him against certain persons, owners of a steam fishing vessel, called the "Petrel." The application charges, in substance, that the "Petrel," by the use of seines and sink nets, is rapidly exterminating the fish in the sea in the vicinity of Nantucket; and asks for an injunction restraining them from the use of seines and nets for the purpose of taking fish. _{July 7.}

The information is certainly one of novel impression. There is a statute prohibiting the use of seines and nets for the purpose of taking fish in the waters adjacent to the Island of Nantucket. St. 1870, c. 284. If the information is based upon an alleged violation of this statute, it cannot be maintained. A bill in equity is not a suitable proceeding for the enforcement of penal statutes.

See *Attorney-General v. Selectmen of Wellesley*, 1 Op. Atty.-Gen. 646, 647

Apparently, however, the information proceeds upon the proposition that the right of fishing is common to all citizens and that, by reason of the methods employed by the respondents, there is danger that this right may be destroyed. Such right, however, if it exists, is without restriction as to the amount of fish taken and the methods employed. An information will not lie against these respondents because they are able to take more fish than other citizens. If they were able to take all the fish that swam in the waters, they would still be in the exercise of the common right of all citizens.

The use of the name of the Attorney-General is refused.

Frank M. Davis, for the petitioner.

ATTORNEY-GENERAL *v.* CHARLES P. CURTIS, JR.

Public Officer — Police Commissioner of Boston — Quo Warranto — Attorney-General.

When a public official, the legality of whose appointment is questioned, has served more than four-fifths of the term for which he was appointed, the Attorney-General will not grant the use of his name to an information in the nature of a *quo warranto* against him, if no public rights are affected by the official's continuance in office *de facto*.

1899
July 8.

This was an application to the Attorney-General for the filing of an information against the respondent, alleging that he was unlawfully appointed to the office of police commissioner, and that he still holds such office in violation of law.

The statute authorizing the appointment of police commissioners (St. 1885, c. 323) provides that persons appointed police commissioners of the city of Boston shall be "citizens of Boston, who shall have been residents therein two years immediately preceding the date of their appointment."

It is said that the respondent had become a citizen of Boston about the time of or shortly before his appointment; but I understand it to be conceded that he had not, for more than two years preceding that time, been a citizen of Boston, although he had

resided in the city for a greater part of the time each year, his legal residence during the three years preceding his appointment being in Swampscott.

He was appointed to the office of police commissioner April 23, 1895, for a term of five years. He has since been a citizen of Boston, and is now, therefore, eligible for appointment to that office.

The information is sought by a police officer, who was tried, without protest on his part, before the respondent as one of the police commissioners, found guilty, and sentenced to be reduced in rank from a sergeant to a patrolman. No objection was made by the police officer to the jurisdiction of the respondent until after adjudication adverse to him.

If an information like this had been applied for within a reasonable time after the appointment of the respondent, I should have felt it my duty to allow the use of the name of the Attorney-General, that the legality of the appointment might be determined in the courts of the Commonwealth. There is, at least, a doubt whether the respondent was originally eligible. Conceding him to have been a citizen of Boston at the time of his appointment, and that he had resided in Boston for the greater portion of the three years prior to his appointment, it is still doubtful whether the word "residence," in the statute, is not to be taken as synonymous with domicil. If so, the facts do not bring him within the terms of the statute.

I do not deem it important, however, to consider this question, for I am of opinion, upon all the facts, that it is my duty, in the exercise of the discretion confided to the Attorney-General, to refuse the application. The respondent has served more than four-fifths of the term for which he was appointed. He is now eligible to appointment, and could be reappointed in case he were removed from office under a proceeding of this character. Moreover, no public rights are affected by his continuance in the office *de facto*. The legality of his official acts cannot be inquired into collaterally. He is in office under color of right; and, having served four years, without any attempt to question his authority during that time, I do not think the public inter-

ests require that the legality of his appointment — which, in view of all the circumstances, has become little more than a moot question — should be brought in question now by a proceeding to which the Attorney-General is a party. The right to institute proceedings of this character, the exercise of which is confided to the discretion of the Attorney-General, is one which should be used only with a view to the public welfare. It is, indeed, important that all officers should be lawfully elected or appointed to the positions they hold; and, if any doubt exists as to the legality of such election or appointment, that such doubts should be promptly resolved. But such questions should be raised without undue delay. While laches cannot be imputed to the public, or to its officer, the Attorney-General, the principles which govern the application of that rule to private individuals have much force when an application of this sort is brought so long after the act which it is attempted to draw in question; and, unless some public right is affected, it is the duty of the Attorney-General to refuse an application which not only cannot serve any useful purpose, but is brought so near the end of the term of the office in question that it may not be determined finally until the term has expired. *Commonwealth v. Allen*, 128 Mass. 308.

These considerations have especial weight when the reason for the application is considered. The petitioner in this case seeks to impeach the title of a judge whose jurisdiction he did not challenge while he was on trial. He was apparently contented until the respondent decided against him. In similar cases in England, where an act of Parliament (St. 9 Anne, c. 20) authorized applications to be made by private individuals to the court of King's Bench for an order directing the king's attorney to file an information, it has been frequently held that, when such applications were made by persons who had not objected to the regularity of the proceedings complained of until after defeat, the application would be denied. *Rex v. Dawes*, 4 Burrows, 2120; *King v. Parkyn*, 1 Barnwell & Adolphus, 652. To the same effect is *Dorsey v. Anslie*, 72 Ga. 460; *People v. Waite*, 70 Ill. 25.

I am clearly of the opinion that the petitioner has not shown that the interests of the public require the filing of this information; and the name of the Attorney-General is accordingly refused.

William E. Cassidy, for the petitioner.

Solomon Lincoln, for the respondent.

ATTORNEY-GENERAL *ex rel.* SAMUEL KASON *et al.* v. DANIEL J. KILEY.

City Council — Organization — Ratification of Irregularities — Information — Acts of de facto Official — Attorney-General.

The Attorney-General has authority to file an information where the application for the filing of such information alleges that the respondent was unlawfully appointed to a public office, and holds it in violation of law.

It is not necessary that the Attorney-General should be satisfied that the information which he is called upon to sign can be maintained, if the questions raised by it are doubtful, and the matter is one of public importance which cannot otherwise be determined.

When at a first meeting of the members-elect of the common council of the city of Boston the senior member took the chair, and, after calling the council to order, entertained and declared carried a motion to adjourn, and immediately left the chair, refusing to entertain a doubt of the vote expressed by one of the members, the rights of the members-elect were not concluded by such adjournment, and they might select some other person to take the chair, and proceed with the organization of the council.

When a presiding officer of the common council is elected under proceedings of doubtful validity, the records of which, duly made and signed by the clerk, are approved at a subsequent meeting, such approval is a ratification of whatever irregularities existed in the original election, notwithstanding the fact that such record was not read, and that the clerk was a *de facto* official, holding over from the previous year.

The acts of a *de facto* clerk have all the force of those of a clerk *de jure* until they are directly impeached by a proceeding brought to test the legality of his office.

This was an application to the Attorney-General for the filing of an information against the respondent, alleging that he was unlawfully appointed to the office of president of the common council, and that he holds such office in violation of law.

There is no doubt of the authority of the Attorney-General to file such an information. *Dillon on Municipal Corporations*, 4th

1900
January 27.

ed., § 272. *Attorney-General v. Sullivan*, 163 Mass. 446. The office of the president of the common council, which is created by the city charter (St. 1854, c. 448, § 34), the incumbent of which may, under the circumstances, become acting mayor (St. 1882, c. 182), is undoubtedly a public office, the title to which can properly be tried by *quo warranto*.

The information alleges, and the relators offered before me to prove:—

First.—That at the first meeting of the members-elect the senior member took the chair, and, after calling the council to order, entertained and declared carried a motion to adjourn, after which no proceedings of the council could be had excepting upon a new summons.

Second.—That, after such adjournment, the respondent, without election or right, assumed the chair and directed the roll to be called for the election of a president, to which roll call but twenty-seven members responded, a quorum being thirty-eight.

Third.—That such pretended election was void, less than a quorum being present, notwithstanding the fact that the respondent announced that other members-elect were present in the room sufficient to constitute a quorum of the whole council.

If the above propositions were the only ones to be considered, I should feel it my duty to sign the information. It is not necessary that the Attorney-General should be satisfied that the information which he is called upon to sign can be maintained. If the questions raised by it are doubtful, and the matter is one of public importance, it is his duty to sign the information, even though he may be of opinion that it cannot be maintained, for the reason that the questions involved cannot otherwise be determined. I am of opinion that, but for other considerations to which I shall hereafter refer, one of the questions submitted by the information would be of sufficient public importance, and so doubtful, as to make it a fit subject for judicial determination.

I do not think the rights of the members-elect were concluded by the alleged adjournment declared by the senior member. The undisputed facts are, that, having called the council to order,

he entertained a motion to adjourn, put it to vote, without count declared it carried, and, although at once and seasonably the result of the vote was doubted by one of the members, he refused to entertain the doubt, and left the chair. I think this proceeding was in violation of one of the first principles of parliamentary law, which requires sufficient verification of a vote. A member disputing the result of the uncounted vote could not be heard to doubt the result of such a vote until it had been declared. He had the right seasonably to express such doubt, and to insist that there be a count. No such opportunity was given, for the presiding officer left the chair immediately, and refused to act upon the request.

Moreover, it was the business of the council to organize. The member who assumed the chair had no greater rights in the matter than any other member. It is only by courtesy that the senior member presides at an organization. If he abandons that duty, the members have a right to select some other person to take the chair and complete the business for which the council is met. The rights of the council did not cease by the abdication of the person who had assumed the chair; and, whatever may be said of the propriety and good taste of the respondent in assuming the chair and proceeding with the organization of the council, I have no doubt of his legal right so to do; at least, until he was displaced by the election of some other person as temporary presiding officer.

The proceedings, however, under which he claims to have been elected, were, to say the least, of doubtful validity. St. 1899, c. 170, requires that the election of the president of the common council shall be a *viva voce* vote, "each member who is present answering to his name when it is called . . . or declining to vote, as the case may be." More than a majority of the members-elect failed to respond to their names, and the number who voted, all votes being for the respondent, was much less than a quorum. Such an election would be valid if a quorum were in fact present, the number of votes cast being more than one-half of all who were present; but the only evidence of such quorum was the statement of the respondent, while occupying the chair, that

there were present in the room enough members, in addition to those who voted, to make a quorum. That this was so is strenuously denied by the relators; and, if this were the only question in the case, I should certainly feel it my duty to permit the question to be tried by this information.

In a case somewhat similar in its circumstances, in the national House of Representatives, the presiding officer named the persons whom he declared to be present, and thus made their presence a matter of record. It is, at least, questionable whether, without such a record, it would be competent for a presiding officer to declare the presence of a quorum, and make his declaration conclusive evidence of the fact of a quorum.

But it appeared at the hearing that a subsequent meeting of the council was called by the mayor on the eleventh day of January. At this meeting a yea and nay vote was passed, approving the records of the previous meeting. These records were made and duly signed by one O'Kane, who had been the duly elected clerk of the previous common council, and who, it is claimed, under the ordinances of the city, held over until the election of a new clerk.

The records were approved without reading. I do not deem this of importance, however, for it was the right of any member to have the records read, and failure to do so must be taken to impute knowledge of whatever they contained to the members who voted to approve the same. More than a quorum of the whole number of members of the common council voted to approve the records of the first meeting. The records so approved set forth the yea and nay vote under which the respondent claims to have been elected, and the declaration of the presiding officer that other members were present sufficient to make a quorum of the whole council. The respondent has since acted as president of the council without further objection, and measures of financial importance have been passed by the body so organized.

I am of opinion that this vote must be taken as a ratification of whatever irregularities existed in the original election. The ultimate purpose of all parliamentary regulations is to ascertain and register the will of the majority. In whatever manner that

will is conclusively ascertained, the result, in my judgment, must be taken to be the act of the entire body.

It is claimed, however, that St. 1899, c. 170, requires a *viva voce* vote, and that it does not appear, even by the records approved, that such a vote was taken at a meeting when a quorum was present. But this statute relates only to the manner of voting, and does not touch the other questions raised. A majority of the council, by their approval of the records declaring a quorum present, have said that such a quorum was present. This being so, and the vote having been taken in accordance with the provisions of the statute, the purpose of the statute has been fulfilled.

It is also contended that O'Kane could not hold over, and was not authorized to act as clerk until election by the council of 1900. Without discussing the merits of this question, it is sufficient to say that he was *de facto* clerk, and was recognized as such; and, under the familiar principles of law applicable to such subjects, his acts have all the force of a clerk *de jure* until they are directly impeached by a proceeding brought to test the legality of his office. This is not such a proceeding; for it is aimed, not at the legality of his election, but at that of an officer claiming to have been elected at the meetings in which he was acting as clerk *de facto*.

No public purpose can be served by this information. A clear majority of the common council have expressed, in the most conclusive way, their desire that the respondent shall continue to act as president of the council. There is no other claimant to the office whose rights are lost by failure to file this information. On the contrary, I assume that, even in case the information should accomplish its purpose of ousting the respondent, he would immediately be re-elected. There is no cloud thrown upon the proceedings of the council by reason of his incumbency of the office, for it is well settled that the acts of an officer *de facto* are binding and effectual until he is ousted by judgment of a court of competent jurisdiction.

For the foregoing reasons, I am of opinion that it is my duty to refuse the application.

Charles T. Russell, for the relators.

Thomas M. Babson, for the respondent.

ATTORNEY-GENERAL *v.* TAY EDWARDS.*Statute — Specific Remedy for Violation — Attorney-General.*

The Attorney-General will not sign an information to restrain a respondent from violating the provisions of a statute, where the Legislature has provided a specific form of remedy for such violations.

Where such specific form of remedy is provided, it is to be followed to the exclusion of all other forms.

1900
July 28.

This was a petition requesting the Attorney-General to sign an information against the respondent, restraining him from constructing and erecting a building on Malcolm Street in the city of Boston, in violation of the provisions of St. 1894, c. 443, § 9.

The statute in question is an amendment of St. 1892, c. 419, relating to the construction and repair of buildings in the city of Boston. Both the original statute (§ 25) and the amended statute (§ 9) limit the height of buildings to be erected upon public streets or private ways. The information alleges that the building proposed to be erected by the respondent is to be higher than is allowed by the amended law.

The statutes in question contain, in addition to regulations as to the height of buildings, many other provisions relating to their construction, including sections relating to the materials to be used, the character of the brick work, thickness of the walls, the construction of chimneys, gutters and floor beams, the pitch of roofs, sky lights, leaders, etc. In the original act the enforcement of these provisions devolved upon the inspector of public buildings; but by St. 1894, c. 257, § 1, it was provided that "The supreme judicial court, or any justice thereof, and the superior court, or any justice thereof, in term time or vacation, shall, on the application of the city of Boston, by its attorney, have jurisdiction in equity to enforce or prevent the violation of the provisions of the acts relating to the erection or alteration of buildings or other structures in the city of Boston, and may, on such application, restrain the erection, alteration, use or occupation of any such

building or structure which is being or has been erected or altered in violation of any of the provisions of said acts."

The statute last quoted was enacted before the amended statute above referred to; but, under the plain rules of construction applicable to such cases, the latter act being but a continuation of the former act, the statute of 1894, above quoted, was as applicable to the amended statute as to the original enactment.

It is well settled that, when the Legislature has provided a specific form of remedy for violations of the provisions of a statute, such remedy is to be followed to the exclusion of all other forms. When a statute provides a remedy for violations of it, the remedy is generally exclusive; but if it provides no remedy, relief from wrongs against it is to be sought at common law. *Attorney-General v. Williams*, 174 Mass. 476-484. In the case cited, the court, after reciting in full the statute of 1894, above quoted, relating to the remedy for violations of the building laws in the city of Boston, said: "It was passed in reference to the elaborate statutes then in force enacted under the police power of the Legislature for the regulation of the erection of buildings in the city of Boston;" and the opinion clearly intimates that the remedy provided by the statute is exclusive, so far as concerns cases arising under the building laws of the city of Boston.

This being so, it is not the duty of the Attorney-General to interfere. Without determining whether in any case an injury to the public might exist, of sufficient gravity and importance to warrant his interference, it is sufficient to say that no such case is presented here. The party aggrieved should seek his remedy in the method prescribed by the statute.

James A. Tirrell, for the relators.

Edward W. Hutchins and *Henry Wheeler*, for the respondent.

ATTORNEY-GENERAL *v.* GEORGE P. SANGER *et al.*, BALLOT
COMMISSIONERS OF THE CITY OF BOSTON.

*Australian Ballot Law — Illegal Nominations — Certiorari —
Attorney-General.*

It does not appear to be the intent of the laws regulating the Australian ballot that the nomination of candidates shall be delegated by the convention to a committee who are empowered to select candidates and to present their names to the Ballot Commissioners as the nominees of the convention; and if an application for a writ of *certiorari* to declare illegal the nominations so made should be presented by a member of the convention or by any considerable number of the voters of the party, it would be the duty of the Attorney-General to permit the use of his name, in order that the question of the legality of such nominations might be determined by the court.

But where the only protest is made by a candidate of another party whose name appears upon the official ballot, and the delay incidental to the determination of the question by the court will endanger the legality of the whole election, the Attorney-General will, in the exercise of the discretion entrusted to him, refuse to sign an information, if it appears that neither the candidate seeking that proceeding nor the voters suffer substantial injury thereby.

1900
December 5.

This was an application to the Attorney-General for the use of his name in a petition for *certiorari* against the respondents, Ballot Commissioners of the city of Boston, alleging in substance that they had wrongfully ordered the names of six men, the nominees of the Democratic party, to appear upon the official ballot at the coming election, as candidates for the office of school committee.

The information was sought by Alfred S. Hayes, whose name is to appear upon the ballot as an independent candidate for the same office.

The grounds upon which the petition is based are that the Democratic convention for the nomination of candidates, instead of nominating candidates for school committee, referred the whole matter to a committee of twenty-six, with full power to select candidates and to present their names to the Ballot Commissioners as the nominees of the convention. It is claimed that this action is contrary to the laws regulating the Australian ballot, and that the commissioners should not have allowed their names to go upon the ballot.

I am very strongly inclined to the opinion that the nomination was irregular. It appears to be the intent of the statutes that

candidates shall be nominated by a convention duly called and held for that purpose, and it is very doubtful whether a nomination by a committee appointed by the convention, without subsequent ratification by the convention itself, is a compliance with the law. It was stated at the hearing that this practice had existed for many years before the enactment of the Australian ballot laws, and is still in force to a large extent in the Democratic party. Custom, however, cannot in this case make law.

If the application were seasonably made, by a member of the convention or by any considerable number of the voters of the party, for a writ of *certiorari* to declare such nominations illegal, I should deem it my duty to permit the use of the name of the Attorney-General, in order that the question of the legality of such a method of nomination might be presented to the court for a decision.

But this is no such case. It was stated at the hearing that no member of the convention protested at the time of the holding of the convention, or has since protested to the candidates of the convention. So far as acquiescence can be presumed from these facts, the candidates in question may be said to be the accepted candidates of the party whose nominees they claim to be. This petition is promoted by one whose name will also appear upon the official ballot. Whether in law his rights are affected by the addition upon the same ballot of unauthorized names, it is not necessary to determine. It is certain, however, that no one who desires to vote for him is misled or deprived of his opportunity so to vote by reason of the appearance of the names in question.

Moreover, it was stated at the hearing, and not controverted, that, in view of the nearness of the election and the enormous labor incident to the printing of the official ballot for all the precincts in the city, if the determination of the question raised were postponed for even a short time, it would endanger the legality of the city election. It was claimed, indeed, that, if the question were brought before the court and not determined to-day, it would be doubtful whether the sample ballots and the regular ballots could be prepared within the time prescribed by law.

An application to strike names of candidates from the Australian ballot, and thus inconvenience voters desiring to vote for

such candidates, is not to be received with favor. The clear intent of the statutes relating to the Australian ballot is, while requiring certain necessary forms to be observed in making nominations, to give every voter the fullest opportunity to express his choice by the ballot, without unnecessary inconvenience. But if, on the other hand, by reason of any technicality, a candidate whose election is desired by any considerable number of voters should be refused a place upon the ballot, not only he, but those desiring to vote for him, would be put to burdensome and unnecessary inconvenience. Such a course should only be sustained upon the clearest warrant of law.

The Election Commissioners, to whom questions of this character are committed under the statutes, have fully considered this case, and, after a hearing of the parties, have determined that the names of the candidates in question should appear upon the ballot. As no substantial injury appears to result from the decision of the commissioners, either to the candidate seeking this proceeding or to the voter, and as the legality of the city election may be imperilled if legal proceedings are taken at this late day, I am clearly of the opinion that, in the exercise of the discretion entrusted to the Attorney-General, I should not sign the information.

George W. Anderson, for the relator.

Thomas M. Babson, city solicitor, for the respondents.

ATTORNEY-GENERAL *v.* SELECTMEN OF HOLLISTON.

Member of Political Party — Caucus — Registrar of Voters.

A member of one of the principal political parties does not sever his connection therewith by participating in a caucus of another party and voting for certain candidates therein nominated, and his appointment to represent such party as registrar of voters is not illegal.

1901
November 16.

This was an application to the Attorney-General to file a petition for a writ of mandamus against Eugene A. York, a member of the board of registrars of Holliston, who was appointed by the selectmen as a Democrat under the provisions of St. 1898,

c. 548. Two others of the four members of the board were conceded to be Republicans. The petition claimed that said Eugene A. York is, and, at the time of his appointment was, a Republican, and that, there being two other Republicans upon the board previously appointed, it was and is the duty of the selectmen to remove him. The petition was promoted by members of the Democratic town committee. They had previously petitioned the selectmen to remove said registrar, and the petition had been refused by the selectmen after a hearing.

The facts as they appeared at the hearing were practically not in dispute. Eugene A. York, the registrar in question, had been a Democrat in regular standing for many years as far back as the time of the civil war, and had continuously voted the Democratic ticket, and taken part in the work of the party, up to the fall of 1900. He was a member of the Democratic town committee of Holliston for the three years ending in 1897.

In the fall of 1900 he was present at and participated in a Republican caucus held in Holliston for the nomination of candidates for the State ticket. His purpose was to secure the nomination of a friend of his who was a candidate for nomination upon the Republican ticket. The person he voted for was nominated, and York voted for the candidate so nominated at the State election. Otherwise, he voted the Democratic ticket. In the spring of 1901, at a Republican caucus held for the nomination of candidates for town offices, he again participated, and for a similar purpose. He declared at the hearing, however, and the statement was not challenged, that it was his purpose to vote at the coming election for all the candidates of the Democratic party upon the State ticket.

St. 1898, c. 548, § 91, provides that no person having voted in the caucus of one political party shall be entitled to vote or take part in the caucus of another political party within the ensuing twelve months. The position of the petitioner is that under the provisions of this statute York is estopped from claiming to be a Democrat. But I am unable to construe the provisions relied upon so narrowly. The purpose of the statute, in my opinion, is to prevent one person from participating in the caucuses of two political parties, and the consequent opportunities for fraud

and confusion which might result therefrom. It is not intended to define conclusively the political status of the voter.

The statute relating to the appointment of registrars intends that they shall be composed of men of different political parties. It is well known that oftentimes a member of a political party may disagree with some of its principles and may refuse to vote for some of its candidates. The history of the Democratic party during the last four years is a sufficient illustration of this proposition. A man does not necessarily cease to be a Republican because he votes occasionally for a Democratic candidate, or because he is unable to subscribe to some particular plank in the platform of his party. If, on the whole, he allies himself continuously with one of the principal political parties, he is, in my judgment, to be deemed a member of that party within the meaning of the statute under consideration. *Jaquith v. Wellesley*, 171 Mass. 138. In this case the registrar complained of acted irregularly in voting in a Republican caucus; but, while it may be true that an appointment might and perhaps should have been made of a man more in sympathy with his party associates, I see no reason to suppose that the courts would declare the appointment illegal. I therefore decline to sign the petition.

Charles J. Flagg, for petitioner.

Joseph Dexter, for respondents.

ATTORNEY-GENERAL *v.* STOUGHTON & RANDOLPH STREET
RAILWAY COMPANY.

Information — Attorney-General — Forfeiture of Charter — Wrong to Public.

The Attorney-General will not sign an information in equity for the forfeiture of the charter of a street railway corporation where the alleged illegalities are slight and technical in their nature, and the public suffers no substantial wrong therefrom.

1902
January 6.

This was an application to the Attorney-General for the filing of a bill in equity by him against the Stoughton & Randolph

Street Railway Company for the forfeiture of its charter, and to restrain it from occupying the highways of said towns with its rails and cars.

It appeared at the hearing that the company in question was organized under general laws, on the eighteenth day of July, 1899, and a location was granted to it by the municipal authorities. Under the provisions of the statutes of the Commonwealth the corporate powers of a street railway company cease unless, within eighteen months from the date of its certificate of establishment, it has built and put in operation some portion of its road. (R. L., c. 112, § 28.) This limitation expired January 18, 1901. By St. 1901, c. 144, this time was extended to the first day of August, 1901. On the latter date a portion of its tracks had been laid, and a car drawn by horses had made trips over the portion of the road so constructed. It was not pretended that such trips were made for the accommodation of the public. Indeed, it was conceded at the hearing that whatever was done in the way of operating cars prior to August 1, 1901, the last date of limitation, was done by the company not for the purpose of serving the public, but solely for the purpose of saving its corporate rights; and, if I deemed it necessary to find whether there had been any substantial compliance with the provisions of the statute, I should be constrained to find against the company.

It further appeared that on the eleventh day of August, 1900, the selectmen declared that the location of the road was forfeited by its failure to comply with the conditions of the location. It was not disputed that certain of the conditions set forth in the location had not been complied with in form or in substance; but it appeared that subsequently the selectmen attempted to revive the location and to waive the non-performance of the conditions of the original location, without further notice, hearing or adjudication, as provided by the statutes in the case of original locations. Upon these facts the petitioners contended, first, that its charter was forfeited; and, second, that its present location was void, and that it had no right upon the streets.

I do not deem it necessary to pass upon the many and interesting questions of law raised by the counsel for the petitioners upon

these facts, for, in my opinion, I am not called upon to exercise the discretion vested in the Attorney-General in cases of this character in favor of the petitioners. It appears that, in so far as they had a right, the selectmen have waived all non-performance of conditions which had invalidated the location of the company, and have imposed certain new conditions, which have been accepted, and are content with the situation. In pursuance of its agreements with the selectmen of the several towns, it has completed the construction of its tracks to the satisfaction of the Railroad Commissioners, and for some time the company has been operating its road regularly with electric cars, and in a manner to accommodate the travelling public.

Upon these facts, and in the absence of any complaint from the town authorities, or even from the abutters (if it be conceded that they have any ground of complaint to this office), I am of opinion that the signing of this information would not accomplish any useful public purpose. It is true that in many cases proceedings may be properly instituted against individuals and corporations who are doing acts prejudicial to the rights of the public, even though the proceedings be asked for by persons who have private interests only to subserve. But in this case no substantial wrong is being done to the public. The road is being operated for the accommodation of travellers substantially upon the location granted by the selectmen, and in accordance with the purpose of its original charter. Whether it is technically in the legal exercise of its privileges is not a question which, in my opinion, the Attorney-General is called upon to submit to the consideration of the courts.

The application is therefore refused.

Harvey H. Pratt, for the petitioners.

A. J. Selfridge, for the respondent.

ATTORNEY-GENERAL *v.* CHARLES C. SPEARE *et als.**Election — Precinct — Election Officers — Misconduct — Attorney-General.*

Where, at an election in a town divided into precincts for voting purposes, the election officers in two precincts, before any vote was cast, unlawfully entertained and declared carried motions to adjourn the meetings, and, without regarding the protests of qualified voters present and desiring to vote, adjourned the meeting and carried away the ballot boxes, but the remaining precincts proceeded with the election and filled the offices named in the warrant, the misconduct of the election officers in the precincts where meetings were adjourned does not invalidate the election legally held in the remaining precincts of the town; and, if there was a regular and proper expression of the public choice in the precincts where voting took place, the candidates so chosen and the questions so decided must be accepted.

The Attorney-General will not sign an information against certain respondents alleged to have been illegally elected to office at a town election, where there are no other claimants to the offices held by such respondents, and it appears that, notwithstanding the illegality alleged, there has been a legal and proper expression of the choice of the voters of such town upon the questions presented in the warrant for such election.

This was an application to the Attorney-General for the filing of an information against certain respondents alleged to have been illegally chosen to the several town offices in the town of Templeton. The petition sets forth, and the allegations of fact are not controverted, that a warrant for the annual town meeting for the year 1903 in the town of Templeton (which, for voting purposes, is divided into four precincts) was duly issued by the selectmen and was properly served; that, under the provisions of such warrant, the qualified voters of the town were notified to meet in their respective precincts on March 2, for the election, on one ballot, of the following town officers: town clerk, one selectman for three years, treasurer, tax collector, tree warden, two auditors, and seven constables; and also for the purpose of voting, by separate ballot, *yes* or *no* in answer to the question, "Shall licenses be granted for the sale of intoxicating liquors in this town?" The warrant further provided that the polls should be opened at 8 o'clock in the forenoon and might be closed at 2 o'clock in the afternoon; and due notice was given of a second meeting, to be held in a central place, on March 7, to act upon the remaining articles contained in such warrant.

1903
April 29.

After the opening of the town meeting of March 2, motions were entertained in precincts 1 and 2 to adjourn the meeting of such precincts to April 6; and, in spite of protests made by certain of the qualified voters thereof, the meetings were in consequence adjourned, and the election officers refused to receive any ballots, and removed the poll boxes. It is further alleged and admitted that by this action of the election officers some of the legal voters of such precincts were deprived of elective franchise.

The votes cast in precincts 3 and 4 were, however, duly counted, and the officers named in the warrant were declared duly elected, and the vote of the town upon the question of license was declared to be: "No, 161; yes, 168." It appeared at the hearing that all the requirements of law were complied with in precincts 3 and 4, and that, if the full vote of precincts 1 and 2 had been cast, it would not have affected the result except in the matter of license, upon which question it was admitted that such vote might have been material.

There were at the time of the election no contestants for the offices now held by the respondents, and such officers were, with one exception, duly elected to the positions which they now hold, at the town meeting of the previous year.

R. L., c. 11, § 213, provides in part that:—

In towns, at the election of state and town officers, the polls may be opened as early as six o'clock in the forenoon and shall be opened as early as twelve o'clock, noon, and shall be kept open at least four hours, and until the time specified in the warrant when they may be closed; and they may be kept open for such longer time as the meeting shall direct, but they shall not be kept open after the hour of sunset. At annual town meetings they shall be kept open at least one hour for the reception of votes upon the question of licensing the sale of intoxicating liquors.

It cannot be doubted that the action of the election officers in precincts 1 and 2 was a clear violation of this section, for which they are liable in a criminal prosecution, and probably also responsible civilly, if, by their action, any legal voter is deprived

of his right to exercise the franchise. But the misconduct or fraud of officers who are charged with the conduct of an election does not necessarily result in invalidating the whole election. It is a well-established principle of law that the misconduct of election officers or irregularities in the method of conducting an election will not vitiate such election unless it appeared that the result was thereby affected. See *Major v. Barker*, 99 Ky. 305, etc. Nor will the fact that the requirements of law with regard to the opening and closing of polls have been disregarded be sufficient of itself to invalidate the election, in the absence of evidence that the result was thereby materially changed or affected. *Fry v. Booth*, 19 Ohio St. 25; *Cleland v. Porter*, 74 Ill. 76; *Du Page County et al. v. People ex rel.*, 65 Ill. 360.

If, therefore, the sole question presented by the petition in this case was as to the legality of the election of the respondents, there would be no good and sufficient reason for action upon the part of the Attorney-General. It may be assumed, however, upon the evidence presented, that the vote of precincts 1 and 2 could have materially affected the action of the town upon the question of license; and for this reason it is necessary to consider whether the irregularity of the officers of those precincts will render invalid the whole election in the town of Templeton. No allegation of fraud or collusion is made in the petition, and it may be assumed that the motion to adjourn was made in good faith, and that the adjournment which resulted was in accordance with the wishes of a majority of the voters present at the time, although clearly illegal. Such adjournment would not of itself, however, invalidate an election subsequently held within the time required by law, in such precincts. See *People ex rel. v. Brewer*, 20 Ill. 474. But the removal of the ballot boxes in such precincts by the election officers and the refusal thereafter to receive votes, by which a subsequent election was prevented, constitutes a violation of R. L., c. 211, § 213; and it is contended by the relator that this illegality vitiates the whole election in the town of Templeton, notwithstanding the fact that the elections held in the remaining precincts were regular, and the offi-

cers elected thereat were duly certified and returned in compliance with law.

If this contention is sound, it would follow that any misconduct or irregularity on the part of election officers in a single precinct in the conduct of an election, which affected the result, would vitiate not merely the vote of such precinct, but would render null and void the whole election, notwithstanding the fact that a great majority of the voters taking part therein had legally and properly signified their choice.

The principle contended for by the relators has nowhere received the sanction of authority.

In *Knowles v. Yeates*, 31 Cal. 82, where in a county election a question arose as to the legality of the votes of four precincts, the vote of such precinct was rejected, but the election was not invalidated. See, also, *Tebbe v. Smith*, 108 Cal. 101.

In *Major v. Barker*, 99 Ky. 305, the contention of the contestant was that the whole vote of a precinct should be thrown out by reason of the misconduct of an election officer, but no question was raised as to the validity of the election. See, also, *Fry v. Booth*, 19 Ohio St. 25; *Du Page County et al. v. People ex rel.*, 65 Ill. 360, etc.

I am of opinion, therefore, that, although the votes cast in certain precincts must be rejected, where it appears that, by reason of the misconduct of the election officers, the result of the election has been materially changed or affected, such misconduct cannot be deemed to vitiate the whole election; and if there has been a legal and proper expression of the public choice in other precincts, the candidates chosen or the questions decided thereat must be accepted. Nor does the fact that the election officers in precincts 1 and 2 refused to receive any votes therein distinguish in principle the present case from one where a vote is cast and afterwards rejected by reason of some irregularity or informality. See *Knowles v. Yeates*, 31 Cal. 82.

Upon the foregoing facts and for the foregoing reasons, therefore, I am of opinion that no public purpose can be served by this information. There has been what, in my opinion, constitutes

a legal expression of the choice of the people of the town of Templeton upon the question of license; and, to the offices held by the respondents, there appear to be no claimants whose rights might be defeated or lost by failure to file this information. I am, therefore, of the opinion that it is the duty of the Attorney-General to refuse the application.

Frank M. Forbush, for the relators.

Thomas W. Kennefick, for the respondents.

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- ATTORNEY-GENERAL** — Duty — Advice as to Effect of Non-compliance with Law . . . 50

The Attorney-General will not advise a State Board what will be the effect upon proceedings in court instituted by it of its compliance or non-compliance with certain provisions of law. It is the business of the Board to comply with the law.

- 2. — Medical Examiners not entitled to Opinion of . . . 95
Medical examiners are not entitled to the opinion of the Attorney-General, and therefore are not bound by it.

- 3. — State Officers — When entitled to Opinion of . . . 100
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- 4. — House of Representatives — Authority to require Opinion within Fixed Time — List of Special Legislation . . . 125

The House of Representatives has no authority to fix a limit of time within which the Attorney-General shall discharge his statutory duty of advising the General Court or either branch of it.

It is not within the jurisdiction of the House of Representatives to require the Attorney-General "to prepare and furnish" to it "a list of

ATTORNEY-GENERAL — *Continued.*

all the special legislation affecting the Boston & Albany Railroad," such order not being a question of law within the meaning of Pub. Sts., c. 17, § 7.

- 5. — Order requiring Institution of Specific Proceedings — House of Representatives . . . 405

The House of Representatives has no authority to require that the Attorney-General forthwith appear before some justice of the Supreme Judicial Court for the purpose of obtaining from the court an order restraining the stockholders of a gas company from taking action to increase its capital stock, or to require him to institute specific proceedings of any character.

- 6. — Information in Equity — Penal Statute — Right to take Fish from the Sea . . . 631

The Attorney-General will not sign an information in equity for the enforcement of a penal statute.

Nor will he sign one asking for an injunction restraining the owners of a steam fishing vessel from using seines and nets in taking fish in the vicinity of Nantucket; for, if the right to take fish from the sea is common to all, it is without restriction as to the amount of fish taken and the methods employed.

- 7. — Quo Warranto — Public Officer — Police Commissioner of Boston . . . 632

When a public official, the legality of whose appointment is questioned, has served more than four-fifths of the term for which he was appointed, the Attorney-General will not grant the use of his name to an information in the nature of a quo warranto against him, if no public rights are affected by the official's continuance in office de facto.

- Advice to Executive in Matters of Extradition — Expediency — Good Faith of — Affidavit of Complaining Witness . . . 434
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- Information — City Council — Organization — Ratification of Irregularities — Acts of De Facto Official . . . 635
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- Australian Ballot Law — Illegal Nominations — Certiorari — Quo Warranto . . . 642
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AUSTRALIAN BALLOT LAW — Convention — Nomination of Candidates — Official Ballot — Secretary of Commonwealth . . . 225

A convention cannot divest itself of its duty to nominate candidates by delegating that duty to any person or committee, unless the action of such delegated person is ratified by the convention itself.

The Secretary of the Commonwealth cannot, therefore, place upon the official ballot the name of a candidate upon whom the convention has not itself acted in some form.

2. — Right of Women to participate in Caucuses . . . 469

Under existing statutes, women are not entitled to participate in or to vote at the caucuses of the several political parties.

3. — Joint Caucuses — Towns — Acceptance of Statute . . . 473

In towns using official ballots, which at the State election, held on Nov. 3, 1903, voted to accept the provisions of St. 1903, c. 454, an act providing for joint caucuses of all political parties, as required by section 18, no further action is necessary to render such statute fully operative; the provision in section 2 that caucuses as established by the statute shall be held in towns using official ballots, "which towns at an annual meeting vote that primaries shall be held therein," being applicable only to cases where for any reason the statute was not accepted at the State election specified, in which event the question of acceptance may hereafter be passed upon at an annual town meeting.

4. — Caucus — Filing Call for Caucus with Secretary of Commonwealth — Precedence of Two Political Parties . . . 605

A communication from the chairman of a State committee of a political party, stating that, at a meeting of the executive committee of such State committee, it was voted to hold caucuses of such party upon a specified date throughout the Commonwealth, does not comply with the requirements of R. L. c. 11, § 88, providing that no two political parties shall hold caucuses upon the same day, and that the first filing with the Secretary of the Commonwealth of a copy of the call, as provided for in section 87, shall be entitled to precedence on the day named, if it appears that no record was made of any vote to issue a call for caucuses, and that no copy of any such call was trans-

AUSTRALIAN BALLOT LAW — *Continued.*
 mitted to the Secretary, or that no such call was in fact ever issued.

5. — Nominations — Illegal Nominations — Certiorari — Quo Warranto — Attorney-General . . . 642

It does not appear to be the intent of the laws regulating the Australian ballot that the nomination of candidates shall be delegated by the convention to a committee who are empowered to select candidates and to present their names to the Ballot Commissioners as the nominees of the convention; and if an application for a writ of certiorari to declare illegal the nominations so made should be presented by a member of the convention or by any considerable number of the voters of the party, it would be the duty of the Attorney-General to permit the use of his name, in order that the question of the legality of such nominations might be determined by the court.

But where the only protest is made by a candidate of another party whose name appears upon the official ballot, and the delay incidental to the determination of the question by the court will endanger the legality of the whole election, the Attorney-General will, in the exercise of the discretion entrusted to him, refuse to sign an information, if it appears that neither the candidate seeking that proceeding nor the voters suffer substantial injury thereby.

6. — Registrar of Voters — Members of Political Party — Caucus . . . 644

A member of one of the principal political parties does not sever his connection therewith by participating in a caucus of another party and voting for certain candidates therein nominated, and his appointment to represent such party as registrar of voters is not illegal.

7. — Election — Precinct — Election Officers — Misconduct — Quo Warranto — Attorney-General . . . 649

Where, at an election in a town divided into precincts for voting purposes, the election officers in two precincts, before any vote was cast, unlawfully entertained and declared carried motions to adjourn the meetings, and without regarding the protests of qualified voters, present and desiring to vote, adjourned the meeting and carried away the ballot boxes, but the remaining precincts proceeded with the election and filled the offices named in the warrant, the misconduct of the election officers in the precincts where meetings were adjourned does not invalidate the election legally held in the remaining precincts of the town; and if there was a regular and proper expression of the public choice in the precincts, where voting took place, the candidates so chosen and the questions so decided must be accepted.

The Attorney-General will not sign an information against certain respondents alleged to have been illegally elected to office at a town election, where there are no other claimants to the offices held by such respondents, and it appears that, notwithstanding the illegality

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alleged, there has been a legal and proper expression of the choice of the voters of such town upon the questions presented in the warrant for such election.

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BANGOR & AROOSTOOK RAILROAD COMPANY—Bonds—Legal Investment for Savings Banks . 619
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BOARD OF PARIS EXPOSITION MANAGERS . 60

The Board of Paris Exposition Managers is authorized by Res. 1898, c. 91, to publish a series of monographs on topics illustrating the relative importance of Massachusetts in comparison with other States, to be used as exhibits on the part of the Commonwealth at the Exposition at Paris in 1900.

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— East Boston Tunnel—Constitutional Law . 505
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— Of the Bangor & Aroostook Railroad Company—Legal Investments for Savings Banks . 619
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BOSTON, CAPE COD & NEW YORK CANAL COMPANY—Watered Stock—Issue of Stock not representing Cost of Construction . 155

A bill to amend the charter of the Boston, Cape Cod & New York Canal Company, instead of providing for the authorization of stock and bonds from time to time, as the needs of construction require, and for the expenditure of the proceeds only in such construction, requires the joint board provided for in the charter to ascertain in advance the entire cost of the canal, and to authorize the issuance of the whole amount of stock and bonds needed to cover the cost so ascertained. If the actual cost of construction should be less than such estimate by the joint board, the balance of stock not required for purposes of construction would become the property of the corporation, and, in so far as it did not stand for nor represent capital actually invested, would be "watered stock."

BOSTON ELEVATED RAILWAY COMPANY—Locations granted by Metropolitan Park Commissioners—Taxes—Constitutional Law—Contract . 426

By St. 1897, c. 500, § 10, providing in part that during a period of twenty-five years from the date of the passage thereof no taxes or excises, not then actually imposed upon street railways, should be assessed upon the Boston Elevated Railway Company except as defined in such statute, a contract was created between the Boston Elevated Railway Company and the Commonwealth; and St. 1900, c. 413, § 2, authorizing the Board of Metropolitan Park Commissioners to grant to street railways locations over roadways, boulevards, parks and reservations subject to its control, "upon such terms, conditions and obligations and for such compensation as the public interests and a due regard for the rights of the Commonwealth may require," in so far as it relates to compensation for grants of location, is not applicable to such company.

The ultimate disposition of money received for taxes from the Boston Elevated Railway Company under the provisions of St. 1897, c. 500, § 10, forms no part of the contract created thereby, and may be changed or modified in such manner as the Legislature may deem proper. Such proportion of the taxes received from the Boston Elevated Railway Company as is based upon the mileage owned or controlled by such corporation within such metropolitan park reservations may therefore be credited, under the provisions of St. 1900, c. 413, § 5, to the sinking fund created to meet the expenses of establishing and maintaining such reservations.

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- BOUNTY**—Enlistment to satisfy Specific Order of Commander-in-Chief . . . 236
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- Agricultural Society, when entitled to, from Commonwealth . . . 271
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- BOXING MATCHES** . . . 248
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- BUILDING LAWS**—Theatre—Roof Garden . . . 564
Where it is designed to construct a roof garden over and upon a theatre, the entire structure, from the auditorium to the roof and roof garden or other assembling place so constructed, must be treated as a part of a building designed and used as a theatre, within the meaning of R. L., c. 104, § 36, and is subject to all the regulations and restrictions therein established governing the use of such building as a theatre.
- BUILDING REGULATIONS** . . . 56
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- CAPE COD CANAL**—Approval of Plans, Board of Harbor and Land Commissioners . . . 255
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2. — Board of Harbor and Land Commissioners—Jurisdiction of Joint Board—Locks . . . 257
Under the provisions of the charter of the Cape Cod & New York Canal Company (St. 1899, c. 448), the jurisdiction of questions of location and construction is confided to the Board of Harbor and Land Commissioners; the joint Board of Harbor and Land Commissioners and Railroad Commissioners, therefore, has no jurisdiction over the question of locks except in the matter of the crossing of the canal by the Old Colony Railroad Company, as provided in section 6.
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- CATTLE BUREAU**—Chief of—Orders or Regulations—Approval—Governor and Council—Publication . . . 425
R. L., c. 90, § 4, as amended by St. 1902, c. 116, § 3, which in part provides that no orders or regulations made by the Chief of the Cattle Bureau shall take effect until approved by the Governor and Council, and that such orders or regulations shall be published in the manner therein prescribed, requires that the method of publication shall be prescribed by such orders or regulations, and shall be subject to the approval of the Governor and Council.

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— Joint Canvases—Towns—Acceptance of Statute . 473
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 The Boston Lying-in Hospital is not a city hospital within the meaning of St. 1896, c. 391.

CHARITY—STATE BOARD OF—Reasonable Expenses of Unsettled Pauper at Hospital . 164
 The State Board of Charity may approve a bill for a "reasonable expense" for care of a patient having no settlement within the Commonwealth.

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CHARLES RIVER BASIN COMMISSION—Removal of Craigie Bridge—Eminent Domain . 541
 Under the provisions of St. 1903, c. 465, providing that the Charles River Dam, the construction of which is authorized thereby, "shall occupy substantially the site of the present

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Craigie bridge, which shall be removed by the commission," the Charles River Basin Commission is not required to make a taking of the existing bridge before proceeding with its removal.

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CITIES AND TOWNS—Grant of Franchise—Use of Streets—Compensation . 416
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Commonwealth may, if he is of age, and free to
choose, become a citizen of the town in which
such institution is located.

2. — Unnaturalized Resident of a City . 301
An unnaturalized alien, resident in a city
of this Commonwealth, is not a "citizen"
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— Preference of, in Employment . . . 175
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Act — Original Appointments —
Promotions 119
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cable only to original appointments and to em-
ployment in the labor service. The repeal of

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the words "other qualifications being equal,"
however, in the sixth clause of § 14, c. 320, St.
1884, has the effect to require the preference of
veterans in promotion, subject to the provisions
in the same section that such promotions shall
be on the basis of ascertained merit and of such
examination as the Civil Service Commission
may deem proper.

2. — Veterans' Preference Act 186
The provisions of the civil service legisla-
tion relating to soldiers and sailors are limited
to such soldiers and sailors as served during the
civil war in the army or navy of the United
States, and were honorably discharged there-
from.

3. — Chief Superintendent — Superin-
tendent of City Farm at Lowell . 280
By the term "chief superintendent of a de-
partment," as used in Rule VI., Schedule B,
Class 12, of the civil service rules, is intended
an officer who has the oversight and charge of
the whole of the business of that department,
and acts for and represents the head of the de-
partment in every branch of its authority.
The superintendent of the City Farm at
Lowell is not such an official, and his election,
in disregard of the rules of the Civil Service
Commission, is, therefore, illegal.

4. — Permanent Service — Probationary
Period — De Facto Official 296
The retention in the civil service after his
period of probation is over, without further
appointment, of a certified candidate provi-
sionally appointed, is not a violation of the civil
service rules.
Such de facto official having been certified as
fit by the Civil Service Commission, the re-
quirements of the civil service law are satisfied.

5. — Chief Superintendent — School
House Custodian in the City of
Boston 302
An officer with the title of "School-house
custodian," appointed by the school committee
of the city of Boston, whose duties are "the
general supervision of janitors and the care of
school property, excepting that which comes
within the jurisdiction of the committee of
supplies," is not a chief superintendent of any
department, and is therefore within and subject
to the civil service rules.

6. — Provisional Appointments — Sus-
pensions 302
Where provisional appointments are made
to fill the places of men appointed from the
certified list furnished by the Civil Service
Commission, and immediately suspended, such
appointments are illegal.

7. — Employee — Discharge — Reinstatement . 322
The discharge of an employee by an official
lawfully empowered thereto, duly certified to
and recorded by the Civil Service Commission,

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cannot be withdrawn and such employee reinstated by the successor in office of such official.

8. — Chief Superintendent — Executive Clerks or Secretaries in Divisions of the Street Departments of the City of Boston . . . 342

Officers to be appointed as executive clerks or secretaries in the several divisions of the street department of the city of Boston, whose duties will be to arrange for hearings and other matters, and, in general, to take charge of the business of such divisions, and to stand in the places of the deputy superintendents during their absence, such positions involving some incidental clerical work as well, are within Schedule A, Class 2, of Rule VII. of the civil service rules, and must be selected in accordance with such rules.

9. — Chief Superintendent — Deputy Street Commissioner of the City of Lynn . . . 344

An official designated as the "deputy street commissioner of Lynn," who is appointed by the board of public works, an elective board created by the revised city charter of Lynn (St. 1900, c. 367), having charge, subject to the direction of the city council, of all streets and ways, sidewalks, bridges and sewers, the supervision of wires, street lighting and street watering, and the supervision and care of all public buildings, is not a chief superintendent of any department, since he does not represent such Board throughout its jurisdiction, and he is therefore subject to the civil service rules.

10. — Re-employment of Employee discharged by Reason of Revision of Charter of City of Boston—Specific Exemption . . . 391

St. 1895, c. 449, entitled "An Act to revise the charter of the city of Boston," which provides in section 27 that officers and employees of any department of the city whose positions were abolished or whose tenure of office was affected by the act might be appointed to positions in any department of the city without civil service examination or enrolment, serves to exempt from the operation of the civil service law and rules an employee discharged by reason of such revision, although the re-employment of such employee is deferred until seven years after his discharge.

11. — Chief Superintendent — Officers appointed by the Board of Public Works in the City of Woburn . . . 409

Under the provisions of St. 1897, c. 172, amending the charter of the city of Woburn, and creating in section 32 a board of public works, whose affairs are divided into four administrative bureaus, namely, sewers, highways, water and water supply, and public buildings and grounds, officers appointed by such board and designated respectively superintendent of sewers, superintendent of highways,

CIVIL SERVICE—Continued.

superintendent of water, and superintendent of public buildings and grounds, are not "chief superintendents of departments," within the exemption in Rule VII., Schedule B, Class 12, of the civil service rules, and must be appointed in accordance with such rules.

12. — Promotion — Police Officer of the City of Cambridge . . . 460

The city of Cambridge is not exempted by its charter (St. 1891, c. 364, as amended by St. 1896, c. 173, and St. 1902, c. 367) from the operation of the civil service law and rules, and promotion made thereunder in the police department of such city must be accomplished subject to the established regulations of the Civil Service Commission.

13. — Chief Clerk of the Board of Assessors for the Town of Brookline . . . 467

The office of chief clerk of the board of assessors for the town of Brookline is within the operation of the civil service law and rules, and the person chosen to fill such office must be chosen thereunder, notwithstanding the fact that such person is himself a member of the board of assessors, and employs a substitute to perform the duties of such office.

14. — Chief Superintendent — Superintendent of the Water Department of the City of Chicopee . . . 623

The office of superintendent of the water department of the city of Chicopee, created and defined by St. 1897, c. 239, § 45, such superintendent being the chief executive officer of the water department, and representing it throughout its jurisdiction, is, by the express provisions of civil service rules, Schedule B, Clause 11, exempted from the operation of the civil service law and rules.

CLAIM—Against the United States—Governor and Council—Authority to appoint Agent of Commonwealth for Collection . . . 598
See GOVERNOR AND COUNCIL.

CLERKS OF COURT—Clerk of the Superior Court for the County of Suffolk—Vacancy . . . 536

The phrase "clerk of the courts," in R. L., c. 11, § 277, which provides that in case of a vacancy in the office of clerk of the courts the Governor shall cause precepts to be issued for an election to fill such vacancy at the next annual State election for which precepts can be seasonably issued, extends to and includes the office of clerk of the Superior Court for the County of Suffolk; and it is therefore the duty of the Governor, upon proper representation that a vacancy in such office exists, to issue his precept for an election to fill such vacancy at the next annual State election for which such precept may be seasonably issued.

CLERKS OF COURT—Continued.

2. — Assistant Clerks—Travelling Expenses—Allowance . . . 592
 Under St. 1904, c. 451, § 6, providing that clerks of court and assistant clerks of courts "shall be allowed . . . their travelling expenses necessarily incurred when holding sessions of said courts out of the cities or towns in which they severally reside," the allowance for such expenses must be limited to expenses so incurred when the court is actually in session, and cannot include travelling expenses of a clerk or assistant clerk when engaged upon other duties than attendance upon a session of court.

COMMISSIONER OF CORPORATIONS—Right of Foreign Banking Corporation to file Papers with 31
See FOREIGN CORPORATION. 1.

- Stock Watering—Private Corporation 171
See NEW ENGLAND COTTON YARN COMPANY.

COMMISSIONER OF PRISONS—Rules and Regulations—Massachusetts Reformatory—Release of Prisoners 90
See MASSACHUSETTS REFORMATORY. 2.

COMMISSIONED OFFICER—In Militia—Inability to appear before Board of Examiners by Reason of Sickness . . . 320
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COMMITMENT—Of Sane Epileptics . 103
See CONSTITUTIONAL LAW. 3; MASSACHUSETTS HOSPITAL FOR EPILEPTICS.

- Work House—Labor . . . 548
See LABOR. 4.

COMMON CARRIERS—Of Goods, Wares and Merchandise—Street Railways—Constitutional Law . 263
See STREET RAILWAYS. 2.

COMMONWEALTH—Land—Streets—Town . . . 234
 A town has no authority to lay out a street over land held in fee by the Commonwealth, without the consent of the Legislature.

2. — Land—Deed—Restriction . . . 242
 Where deeds from the Commonwealth to certain grantees of land formerly belonging to the Commonwealth contain the stipulation that buildings erected thereon "shall not, in any event, be used . . . for any mechanical or manufacturing purposes," any use of the estates in question for other than residential purposes would be a violation of the restriction.

3. — Actions by Agents or Representatives—Entry Fee . . . 456
 In all cases where proceedings are instituted by persons appearing and acting as duly authorized agents or representatives of, and for the

COMMONWEALTH—Continued.

establishment or protection of any right or interest in, the Commonwealth, the Commonwealth is the plaintiff in such action, within the meaning of R. L., c. 204, § 6, par. 10, and no entry fee is chargeable therefor.

4. — Hours of Labor of Employees—Office Work . . . 475
 R. L., c. 106, § 19, providing that "nine hours shall constitute a day's work for all laborers, workmen and mechanics who are employed by or in behalf of the Commonwealth," does not include employees whose duties are of such a character as to bring them within the term "office work," and the hours of labor for employees so engaged may be determined by the period of service required for the proper performance of the work of the department in which they are employed.

5. — Land—Conveyance—Board of Harbor and Land Commissioners . 479
 The Board of Harbor and Land Commissioners, under the provisions of R. L., c. 96, § 3, has no general authority to convey land belonging to the Commonwealth.

6. — Investment of Funds controlled by—Notes and Bonds of Counties, Cities and Towns—Net Indebtedness—Treasurer and Receiver-General . . . 561
 In R. L., c. 6, § 65, providing that "funds over which the Commonwealth has exclusive control shall be invested by the treasurer and receiver-general . . . in the notes or bonds of the several counties, cities and towns thereof, or in the scrip or bonds of the United States, of the several New England states, or in the state of New York, in the notes or bonds of any incorporated district in this Commonwealth, or of any city of the New England states issued for municipal purposes, whose net indebtedness at the time of purchase does not exceed five per cent of the last preceding valuation of the property therein for the assessment of taxes;" . . . the clause, "whose net indebtedness at the time of the purchase does not exceed five per cent of the preceding valuation," does not relate to counties, cities and towns of the Commonwealth in the notes or bonds of which the Treasurer and Receiver-General is authorized to invest the funds of the Commonwealth.

- Employee—Salary—Additional Compensation . . . 309
See EMPLOYEE OF COMMONWEALTH.

COMPENSATION—Employee of Commonwealth—Salary—Additional Compensation . . . 309
See EMPLOYEE OF COMMONWEALTH.

CONSOLIDATION—Of Co-operative Savings Banks—Rights of Minority . . . 484
See CO-OPERATIVE SAVINGS BANKS. 4.

CONSTITUTIONAL LAW—Consolidation of Boston Gas Companies—Charter subject to Amendment, Alteration and Repeal 36

An act which should authorize the gas companies of Boston, whose charters are subject to amendment, alteration or repeal, to consolidate, and provide that, unless they did consolidate before a certain date, their charters should be repealed on that date, would be constitutional.

It is doubtful whether the Legislature may delegate to the courts the authority to annul the charters, in case the corporations should not consolidate within the prescribed time.

2. — Public School 100

A school for the instruction of the deaf is not a public school, within the meaning of the eighteenth amendment to the Constitution, and the tuition of deaf children attending such an institution, even if it is maintained by a religious denomination, may be paid by the Commonwealth.

3. — Commitment of Sane Epileptics . 103

The Legislature has no constitutional authority to enact a law authorizing the commitment to and indefinite detention in a hospital or other place of detention of a sane person who has committed no crime.

4. — Rate of Wages on Public Works—Cities and Towns 264

The Legislature may provide that whenever the Commonwealth or any county therein, enters into a contract with any person, firm or corporation, for the doing of public work of any nature, it shall be stipulated that such person, firm or corporation shall pay employees no lower rate of wages per day than is paid by the Commonwealth, or by such county, for similar work; but such a provision, as affecting cities and towns, would be unconstitutional, and cannot be cured by making the provision operative only upon acceptance by a majority of the voters of such cities and towns.

5. — Police Power—Regulation of Advertisements near Public Parks or Boulevards 326

Local authorities in the various cities and towns of the Commonwealth have no authority under existing laws to regulate or restrict the display of advertisements beyond the limits of public parks, boulevards and ways.

A bill providing that the authorities having charge of parks or parkways may make such reasonable rules and regulations respecting the display of signs, posters or advertisements, near and visible from public parks or boulevards, as they may deem necessary for preserving the objects for which parks or boulevards are established and maintained, and that, after publication of such regulations, any sign, poster or advertisement maintained in violation of them shall be a public nuisance, is a valid exercise of the police power, and neither owners of property affected, nor persons having contracts for

CONSTITUTIONAL LAW—Continued.
advertising prevented thereby from performing the same, would be entitled to compensation.

6. — Vested Rights—Obligations of Contract—Feoffees of Grammar School in Ipswich 354

Under St. 1786, c. 54, making perpetual the agreement set forth in Acts of 1765, c. 5, between the feoffees representing the original donors of land for a grammar school in Ipswich and the town of Ipswich, to the effect that four feoffees on behalf of private individuals and the three selectmen of the town of Ipswich for the time being, on behalf of the town, should be incorporated feoffees in trust for the management of such school, the rights of each group of trustees became vested, as well as the rights of the beneficiaries under the trust; and a bill to increase to six the number of feoffees on the part of the town would be unconstitutional, as impairing the obligation of the contract, and destroying the vested rights without due process of law.

7. — Maximum Day's Work for Employees of Cities, Towns and Counties . 442

The Legislature may constitutionally limit the duration of a day's work for laborers, workmen and mechanics, employed by or in behalf of the Commonwealth, to a period of eight hours; but a like provision applicable to counties, and to cities and towns which have accepted the provisions of R. L., c. 106, § 20, making eight hours a day's work for the employees thereof, would be unconstitutional, as taking property without due compensation and without due process of law.

In respect of legislation fixing eight hours as a day's work for employees of counties, cities and towns, a county is not to be distinguished from a city or town.

— Eminent Domain—Damages Appropriation—Land taken in South Bay 72
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— Private School—Tuition—Westford Academy 75
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— Boston & Albany Railroad Company—Lease—Charter—Impairment of Obligation of Contract—Interstate Commerce 125
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— Impairment of Contract—Cost of Maintenance of State Highway . 195
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— Regulation of Interstate Freight Traffic . 198
See LEASE. 3.

— Method of choosing Presidential Electors 246
See STATE OFFICERS.

CONSTITUTIONAL LAW — Continued.

- Free Transportation of Letter Carriers by Street Railways — Impairment of Obligation of Contract . . . 261
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- Street Railways as Common Carriers of Goods on Highways . . . 263
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- Cities and Towns as Insurers against Fire — Legislature . . . 419
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- Erection of Telephone and Electric Light poles on "Private Way" . . . 423
See TELEPHONE AND ELECTRIC LIGHT COMPANIES.
- Contract with Boston Elevated Railway Company — Tax — Locations See BOSTON ELEVATED RAILWAY COMPANY. 426
- Rights of Minority in Consolidation of Co-operative Savings Banks . . . 484
See CO-OPERATIVE SAVINGS BANKS. 4.
- Hours of Labor on Public Works . . . 497
See LABOR. 3.
- East Boston Tunnel — Tolls — Bonds — Obligation of Contract . . . 505
See EAST BOSTON TUNNEL.
- Passage of Bill or Resolve over Veto — Two-thirds of Branch originating Measure . . . 513
See LEGISLATURE. 2.
- Bounties to Veterans . . . 584
See VETERANS. 3.

CONTAGIOUS DISEASES — Transportation of Infected Persons beyond the Borders of the Commonwealth for Care and Treatment . . . 543

There is no existing provision of law by virtue of which a person found within this Commonwealth suffering with a contagious or infectious disease may, without his consent, be transported beyond the borders of the Commonwealth, to be there confined and treated for such disease.

- Of Cattle . . . 542
See CATTLE BUREAU. 2.

CONTRACT — Authority of Superintendent of Massachusetts Reformatory to make, under Specific Resolve . . . 35
See MASSACHUSETTS REFORMATORY. 1.

- Not to join Labor Organization . . . 54
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- Of Insurance — Medical Attendance . . . 226
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CONVENTION — Nomination of Candidates — Official Ballot . . . 225
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CONVIOT — Parole — Successive Sentences . . . 189
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CONVICTION — Violation of Pharmacy Law — Plea of Nolo Contendere . . . 276
See PHARMACY LAW.

— Registered Pharmacist — Suspension of License . . . 482
See REGISTERED PHARMACIST. 5.

CO-OPERATIVE SAVINGS BANKS — Directors — Proxy Voting . . . 275
The directors of a co-operative savings bank cannot legally vote by proxy.

2. — Collection of Loan — Security . . . 286
If upon the forfeiture of the shares and the foreclosure of a mortgage respectively pledged and executed by a stockholder in a co-operative bank, to secure a loan from such bank, the amount realized therefrom is not sufficient to discharge the loan, the balance remaining unpaid becomes a debt which is presently due and may be recovered by suit forthwith, like any other loan.

3. — Loan — Security — Second Mortgage 462
The purpose of R. L., c. 114, § 14, providing that every loan made by a co-operative savings bank shall be secured by a mortgage of real estate situated within the Commonwealth, and unencumbered by any mortgage or lien "other than such as may be held by the bank making the loan," was to secure the result that property mortgaged to a co-operative savings bank should not be subjected to any liens or mortgages other than those held by the bank itself; and such statute does not forbid a second mortgage upon property upon which the same bank holds a first mortgage, provided that such property is not thereby encumbered to an amount exceeding its real value.

CO-OPERATIVE SAVINGS BANKS— *Continued.*

4. — Consolidation — Rights of Minority
— Constitutional Law . . . 484

The Legislature has no power to compel the minority members in an existing co-operative bank, which is not a stock corporation, to surrender their interest in such bank in exchange for an interest in a consolidated bank, as prescribed in House Bill, No. 1181; but if enacted, the provisions of such bill will govern the rights of all members of co-operative banks organized after its passage, and will serve to authorize the consolidation of existing co-operative banks, if such consolidation is assented to by all the members.

COPARTNERSHIP — Registered Pharmacist — Intoxicating Liquors —

License . . . 621
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CORPORATION — Manufacturing —

Capital . . . 67

St. 1899, c. 199, repeals so much of Pub. Sts., c. 106, § 7, as imposed a maximum limit of one million dollars upon the capital of a manufacturing corporation formed under general laws.

2. — Election of Officers — By-laws —
Attorney . . . 230

The election of the officers of a corporation is a corporate function, which cannot be delegated without express statutory authority.

The statutes do not contain such authority, but, on the contrary, by clear intendment require that such officers shall be elected by the members of the corporation; and a by-law which delegates to the board of directors of a co-operative bank the election or selection of the secretary, treasurer or other officers of the bank is therefore illegal.

An attorney is not an officer of the corporation, and cannot be made one by the by-laws.

3. — Effect of Attempt to organize under
Repealed Statute . . . 362

An organization formed under the provisions of G. S., c. 61, subsequent to the repeal of such statute by St. 1870, c. 224, but not in compliance with the provisions of the existing law, is not a corporation existing by authority of the laws of this Commonwealth, and therefore is not subject to R. L., cc. 14, 109 and 110.

4. — Organization beyond Limits of Commonwealth . . . 496

Persons associating together under the provisions of St. 1903, c. 437, §§ 9, 10, to form a business corporation, may not legally hold the meeting at which the organization of such corporation is to be effected beyond the jurisdiction of the Commonwealth.

5. — Street Railway — Attorney-General
— Quo Warranto — Forfeiture of
Charter — Wrong to Public . . . 646

The Attorney-General will not sign an information in equity for the forfeiture of the charter

CORPORATION — *Continued.*

of a street railway corporation where the alleged illegalities are slight and technical in their nature, and the public suffers no substantial wrong therefrom.

- Contract with Employee not to interfere with Business . . . 54
See EMPLOYEE.

- Boston & Albany Railroad Company —
Charter — Right of Commonwealth
to regulate Traffic and acquire
Property of Railroad — Constitutional
Law — Interstate Traffic —
Waiver — Assignment of Lease . . . 125
See LEASE. 1.

- License as Insurance Agent . . . 299
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- Taxation — Valuation of Corporate
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- Taxation — Valuation of Franchise —
Deductions — Notes Receivable —
Machinery and Merchandise —
Boats, Wagons and Other Appliances —
Deposits in Savings Banks
and Certificates of Interest in Voluntary
Associations and Trusts . . . 568
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- Consolidation — Control — Forfeiture
of Charter — Control of Domestic
Street Railway Corporation by
Foreign Corporation . . . 570
*See NEW YORK, NEW HAVEN &
HARTFORD RAILROAD CORPORATION.*

- Tax on Corporate Franchise — Assessment — Appeal — Party aggrieved
— City or Town . . . 628
See TAXATION. 5.

COUNTY — Sheriff — Supplies for Private Use — Expense . . . 612

The sheriff of Norfolk County, who also acts as master of the house of correction therein, is not entitled to have all necessary provisions for himself and his family furnished by and at the expense of such county.

- Net Indebtedness of . . . 115
See SAVINGS BANKS. 3.

- Maximum Day's Work . . . 442
See CONSTITUTIONAL LAW. 7.

- Net Indebtedness — Notes and Bonds
— Investment of Funds controlled
by Commonwealth — Treasurer
and Receiver-General . . . 561
See COMMONWEALTH. 6.

COUNTY ACCOUNTS—Officers—Fees

—Service of Warrants . . . 20
 Officers serving warrants are entitled to charge for services and expenses. The charge for services comprises fifty cents for each person upon whom service is made, and an allowance for "travel." Expenses are limited to actual and necessary disbursements, and may be charged in addition to the item of constructive travel.

Railroad fares are not included in "travel," and may be charged in addition thereto.

If an officer has charged twice for expenses, the amount may be withheld in any further settlement between him and the paymaster or clerk whose duty it is to pay him.

If an officer knowingly charges for expenses which he did not incur, it constitutes the offence of obtaining money under false pretences.

2. — Fees: Police Officers and Constables—District . . . 209

A district is a distinct geographical division, established by the sovereignty for the purpose of taxation, and therefore the receipt of a salary from such district does not, under St. 1890, c. 440, preclude an officer who in the service of a warrant acts, not as a district, but as a town officer, from charging his fees therefor.

3. — Fees and Expenses before Trial Justices—Constructive Repeal . . . 210

Since it was the intention of the Legislature, in St. 1891, c. 325, to make proceedings before trial justices in all respects like those before the inferior courts of record, a provision in St. 1890, c. 440, which is at variance with such intention, is constructively repealed.

— Title to Money drawn from County Treasury—Law Library Association . . . 3
See LAW LIBRARY ASSOCIATION.

CRAIGIE BRIDGE—Removal of, by Charles River Basin Commission—Eminent Domain . . . 541
See CHARLES RIVER BASIN COMMISSION.

DAIRY BUREAU—Analysis of Milk Samples . . . 50
See ANALYSIS.

DAMAGES, APPROPRIATION FOR—Land taken in South Bay . . . 72
See EMINENT DOMAIN.

DANBURY, CONN.—Bonds of—As Investment for Savings Banks . . . 323
See SAVINGS BANKS. 5.

DANVERS, TOWN OF—Contract for Water Supply for Danvers Insane Hospital—New Building . . . 463
See DANVERS INSANE HOSPITAL.

DANVERS INSANE HOSPITAL—Water Supply—Contract with Town of Danvers—New Building—Trustees . . . 463

Under a contract in force between the Commonwealth and the town of Danvers, by which it is agreed that the Commonwealth may take, free of charge, water from the water supply of the town for the use of the Danvers Insane Hospital, "and of all buildings that at any time may be owned by the State on the grounds; and also for use on the grounds themselves, as now laid out, for any purpose," the Commonwealth may, without payment, take water from the town supply for use in and for a building upon land acquired subsequent to the making of such contract, but not for any independent use upon the grounds so acquired.

"DAY'S WORK"—For Employees of Street Railway . . . 388
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For Employees of Cities, Towns and Counties—Constitutional Law . . . 442
See CONSTITUTIONAL LAW. 7.

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DEED—Restriction—Commonwealth's Land . . . 242
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DE FACTO OFFICIAL—Retention of Civil Service Appointee after Probationary Period . . . 296
See CIVIL SERVICE. 4.

—Acts of—City Council—Organization—Ratification of Irregularities—Quo Warranto—Attorney-General . . . 635
See PUBLIC OFFICERS.

DIRECTORS—Co-operative Savings Bank—Proxy Voting . . . 275
See CO-OPERATIVE SAVINGS BANKS. 1.

DISEASE—Dangerous to Public Health—Pauper—Removal to State Hospital—Expense . . . 499
See PAUPER. 19.

DISCONTINUANCE—Of State Highway . . . 177
See STATE HIGHWAY. 3.

DISTRICT—Fees of Officer receiving a Salary from . . . 209
See COUNTY ACCOUNTS. 2.

DISTRICT ATTORNEY—Employment of Stenographer at Inquest . . . 112
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DOCUMENTS—Approval of Publication
of, by State Board of Publication 398
See **STATE BOARD OF PUBLI-
CATION**. 1.

DOGS—Injury to Domestic Animals—
“Worrying” 250
See **DOMESTIC ANIMALS**.

DOMESTIC ANIMALS—Injury to, by
Dogs—“Worrying” 250
Under Pub. Sts., c. 102, § 98, as amended by St.
1889, c. 454, providing compensation for loss “by
the worrying, maiming, or killing” of domestic
animals by dogs, any sort of attack by a dog, in-
tended to frighten a domestic animal, is “worry-
ing” within the meaning of the statute.

DOMICILE.
See **PAUPER**.

EAST BOSTON TUNNEL—Tolls—
Bonds—Obligations of Contract—
Constitutional Law 505
St. 1897, c. 500, § 17, which authorizes the con-
struction by the Boston Transit Commission of
the East Boston Tunnel, and its subsequent
lease to the Boston Elevated Railway Com-
pany, at an annual rental fixed thereby and
payable to the city of Boston, by pledging such
rental, together with the tolls which the city is
directed to collect from persons passing through
such tunnel, “to meet the principal and in-
terest of the bonds issued to pay for the con-
struction of said tunnel,” and expressing such
pledge upon the face of the bonds “as one of the
terms thereof,” creates a valid contract between
the city of Boston and the purchasers of such
bonds which cannot be impaired by subsequent
legislation; and House Bill, No. 1192, which
abolishes such tolls and instead thereof requires
the city of Boston to set aside from the com-
pensation received by it from the Boston Ele-
vated Railway Company under St. 1897, c. 500,
§ 10, a sum equal to the amount which it would
have received from such tolls, to be pledged in
like manner to meet the principal and interest
of the bonds, for the reason that it varies the
terms of such contract by substituting for the
source of income pledged to secure the bond-
holders another and different source of income,
is unconstitutional and void.

EDUCATION, STATE BOARD OF—
Normal School Teachers—Salary
—Special Services 21
Pub. Sts., c. 21, § 8, providing that no per-
son shall at the same time receive more than
one salary from the State treasury, does not
prohibit the State Board of Education from
employing normal school teachers, with fixed
annual salaries, at teachers’ institutes, and pay-
ing them from the appropriation made for the
use of the Board.
The section does not apply to special services
for a department or commission.

EDUCATION, STATE BOARD OF—
Continued.

2. — Private School—Tuition—West-
ford Academy—Constitutional
Law 75
Westford Academy is a private school, and is
“not under the order and superintendence of
the authorities of the town” of Westford, and
the State Board of Education may refuse to
approve it, either for the purpose of authoriz-
ing the town of Westford to pay the tuition of
children living therein and attending that acad-
emy, under St. 1895, c. 94, or for the purpose of
securing to other towns reimbursement by the
Commonwealth of money expended for the tu-
ition of children in that academy, under the
provisions of St. 1898, c. 496, § 3.

3. — Private Educational Institutions—
Registers for School Statistics . . . 88
The State Board of Education may furnish
registers for the keeping of school statistics to
private educational institutions free of charge.

4. — Approval by, of Boston School for
the Deaf 100
The State Board of Education may approve
the Boston School for the Deaf as an institution
to which deaf children may be sent at the ex-
pense of the Commonwealth.

— Secretary—Petition of Educational
Institutions to confer Degrees . . . 238
See **EDUCATIONAL INSTITUTION**.

EDUCATIONAL INSTITUTION—Pe-
tition for Authority to confer De-
grees—Secretary of State Board of
Education 238
The secretary of the State Board of Educa-
tion is not, under St. 1896, c. 381, required to
take any action upon a petition to the Legisla-
ture for authority to grant degrees in engineer-
ing, presented by a corporation chartered under
the laws of the State of Maine.

ELECTION—Precinct—Misconduct of
Election Officers—Quo Warranto
—Attorney-General 649
See **AUSTRALIAN BALLOT LAW**. 7.

ELEVATORS—In State House—Local
Inspection 300
See **STATE HOUSE**.

EMINENT DOMAIN—Land taken in
South Bay—Damages—Appro-
priation—Constitutional Law—
Harbor and Land Commissioners 72
The Board of Harbor and Land Commis-
sioners is not precluded from taking areas in
South Bay in the city of Boston, under author-
ity of St. 1899, c. 469, because no specific sum
is appropriated by that act to pay damages for
such takings. The act does appropriate so
much money as may be necessary to pay the
damages which may be assessed under it, and
it is therefore constitutional.

EMINENT DOMAIN — *Continued.*

- Erection of Telephone and Electric Light Poles on "Private Way" — Compensation . . . 423
- See TELEPHONE AND ELECTRIC LIGHT COMPANIES.

EMPLOYEE — Contract not to interfere with Business of Employer . . . 54

A requirement by a corporation that its employees shall agree, as a condition of employment, not to take any action, secretly or otherwise, either by themselves or by joining with others, with the intent to interfere with the continuous running of the corporation's business, is not in violation of St. 1894, c. 508, § 3, providing that no corporation shall coerce or compel any person into an agreement not to join any labor organization, as a condition to securing employment or continuing in the employment of such corporation.

EMPLOYEE OF COMMONWEALTH

- Salary — Additional Compensation . . . 309

An employee of the Commonwealth who receives a salary from the State treasury cannot legally receive additional compensation for work performed during the hours of employment for which such salary is paid.

- Hours of Labor — Office Work . . . 475
- See COMMONWEALTH. 4.

EMPLOYMENT — Children — Factory, Workshop or Mercantile Establishment . . . 616

The provisions of R. L., c. 106, § 28, as amended by St. 1905, c. 237, does not permit the employment of children under the age of fourteen years in any factory, workshop or mercantile establishment, nor any other employment of children of such age during the hours when the schools of the cities and towns of their residence are in session.

- ENGINEERS** — Citizenship and Residence of Applicant for License . . . 477
- See LICENSE. 3.

- ENLISTMENT** — Residence . . . 160
- See RESIDENCE. 1.

- To satisfy Specific Order of Commander-in-Chief — Bounty . . . 236
- See BOUNTY.

- ENTRY FEE** — Bastardy Complaints . . . 22
- See FEES. 1.

- ERROR** — In Plans for State Highway — Correction of . . . 177
- See STATE HIGHWAY. 3.

- EVIDENCE** — Certificate of State Inspector and Assayer of Liquors . . . 450
- See INTOXICATING LIQUORS. 2.

- EXAMINATION** — Inability of Candidate for Registration in Pharmacy to understand the English Language . . . 318
- See REGISTERED PHARMACIST. 4.

- Inability of Commissioned Officer in Militia to appear for, by Reason of Sickness . . . 320
- See MILITIA. 1.

EXECUTIVE COUNCIL — Delegation of Authority to approve Warrants . . . 597

The Executive Council may not delegate to one of its members the authority to advise with and consent to the acts of the Governor, in the approval of warrants for the payment of money from the treasury of the Commonwealth.

- EXPENSES** — Special Committee — Expert Advice — Appropriation . . . 457
- See APPROPRIATION.

- EXPRESS COMPANIES, FOREIGN** — Appointment of Agent for Service of Process . . . 221
- See FOREIGN CORPORATION. 3.

EXTRADITION — Governor — Executive Discretion — Expediency . . . 368

The right of the Governor of this Commonwealth to consider questions of expediency or discretion exists only upon applications for requisition issuing from this Commonwealth, or upon demands for the extradition of persons held here in custody to answer for crimes against the Commonwealth, or the United States, or by force of any civil process.

- 2. — State Officer — Duty to notify Fugitive of Right to apply for Writ of Habeas Corpus — Expenses . . . 380

1. An officer serving a warrant for the rendition of a fugitive from justice, issued by the Governor of this Commonwealth, is not required by law to inform such fugitive as to his right to apply for a writ of habeas corpus. It would be well, however, for the officer in each case to inform the party so arrested that this right is open to him.

2. All expenses of a State officer incidental to the transportation and delivery of a person held as a fugitive from justice must be borne by the agent of the demanding State, including reasonable and proper expenditures for hotel bills and railroad fares.

- 3. — Fugitive from Justice — Sworn Evidence — Certification of Officer taking Oath . . . 414

Under the provisions of R. L., c. 217, § 11, requiring that, in the case of a demand upon the Executive of this Commonwealth for the surrender of a person charged with crime committed within the limits of the demanding State, such demand shall be accompanied by sworn evidence that the person charged is a fugitive from justice, an allegation in the petition of the principal complaining witness to the

EXTRADITION — Continued.

Executive issuing the demand, stating that the person sought to be extradited is a fugitive from justice, and sworn to before one signing himself, "J— R—, pro clerk of the court of quarter sessions," such statement not being authenticated by the Executive, and there being no evidence that R— was authorized to administer oaths, is not "sworn evidence" within the meaning of the statute, and the Governor may not lawfully comply with such demand.

4. — Attorney-General — Expediency — Governor — Good Faith of — Affidavit of Complaining Witness . . . 434

The duty of the Attorney-General to advise the Executive upon questions of expediency in matters of extradition, as required by R. L., c. 217, § 12, can only arise in cases of demands made upon the Governor for the surrender of persons held in custody or under recognizance in this Commonwealth to answer for crime, or by virtue of any civil process.

In the case of an application for the issuance of a demand for extradition upon another State, the Executive of this Commonwealth is not to be controlled by the allegations contained in such application, and should satisfy himself upon the truth of every material fact alleged therein. He may inquire, therefore, if there be doubt in his mind, as to the good faith of the affidavit of the principal complaining witness, required by the rules for the practice of interstate rendition, in cases of fraud, false pretences or embezzlement, and setting forth that the sole purpose for which extradition is sought is the punishment of the accused, and that such witness does not intend to use the prosecution for any private purpose.

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The Secretary of the Commonwealth is not authorized to charge a fee for the transfer of pedlers' licenses issued under the provisions of R. L., c. 65, § 19, providing for the licensing of persons "to go about exposing for sale and selling any goods."

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FIRE MARSHAL'S DEPARTMENT
— Hearings — Exclusion of Public 386

The deputy in charge of the Fire Marshal's department of the District Police may exclude, from a hearing conducted by him for the purpose of ascertaining the cause of a fire, all persons other than those summoned to give testimony.

FIREMEN'S RELIEF FUND — Aid to Widows of Deceased Firemen . . . 393

The Board of Commissioners of the Firemen's Relief Fund is authorized under existing statutes to discontinue the allowance of \$400 established by such Board to widows of deceased firemen, under the provisions of St. 1892, c. 177, in view of the payment of \$1,000 designated and established for such purpose by R. L., c. 32, § 77.

FIREMEN — "Firemen's Relief Fund"
— Persons impressed into Service of Regular Fire Department . . . 253

Persons who have been impressed into the services of a regular organized fire department of a city or town, and receive injuries while in the performance of the duties required by them, are not entitled to relief under the provisions of St. 1892, c. 177, relating to the "Firemen's Relief Fund."

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The selectmen of a town have no right to license fish weirs in a harbor bordering on the town beyond the harbor line.

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FISHERIES AND GAME—Protection of Lobsters—Short Lobsters 321
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FISHING—Public Right of, in Great Ponds 223
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— In Great Pond, used as Source of Water Supply—Town 239
See GREAT PONDS. 3.

FLATS—Erection of Structures—Displacement of Tide Water—Solid Filling 217

A decree of court requiring the erection of certain structures in tide water, by the city of Boston, and directing that "the first approach . . . shall be filled with suitable filling," does not require the city to make a structure impervious to water.

The word "solid," when used with reference to a structure to be erected in tide waters, is, unless words are used which clearly require such structure to be water-tight, to be taken to mean a structure built up solidly from the bottom, in contradistinction to one supported on piles.

The compensation to be paid, under Pub. Sts., c. 19, § 14, by the party erecting in tide waters a structure impervious to water, which lessens the amount of flow not only upon the flats covered by it, but also over adjacent flats, should be ascertained upon the basis of all the tide water which such structure displaces.

— Licenses for the Planting and Cultivation of Oysters—Boundaries 431
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FOOD—Adulteration—Beer and Malt Beverages—Indication of Antiseptic or Preservative Substances 606

R. L., c. 75, § 18, providing that food as defined by the statute shall be deemed to be adulterated if it contains any added antiseptic or preserva-

FOOD—Continued.
tive substance except those therein enumerated, "but the provisions of this definition shall not apply to any such article if it bears a label on which the presence and the percentage of every such antiseptic or preservative substance are clearly indicated," is applicable to beer and other malt beverages, whether sold for consumption upon the premises or for removal for consumption elsewhere.

FOREIGN CORPORATION—Foreign Banking Corporation—Right to file Papers with Commissioner of Corporations 31

The Commissioner of Corporations may, under St. 1894, c. 381, accept the charter of a foreign corporation, if the kind of business for which it is organized is one the carrying on of which is permitted to domestic corporations under the laws of the Commonwealth; and it is not necessary that the statutes of the foreign jurisdiction creating it, and defining its powers, duties and liabilities, should be the same in all respects as the statutes of this Commonwealth relating to the same subject.

A foreign banking corporation may file its papers with the Commissioner of Corporations, although the State banking act was made practically inoperative by the imposition of a tax of ten per cent. upon the circulation of State banks by the federal government.

2. — Intoxicating Liquors—Sale of 55

A domestic corporation may, if duly licensed, sell intoxicating liquors within the Commonwealth. A foreign corporation, one of the purposes of which is the sale of intoxicating liquors, cannot be said to be carrying on a business the transaction of which by domestic corporations is forbidden in this Commonwealth, and it is the duty of the Commissioner of Corporations to accept and file the papers of such corporation.

3. — Express Companies—Unincorporated Associations—Appointment of Agent for Service of Process 221

So much of Pub. Sts., c. 73, § 3, which provides that every corporation not organized in, or every association of persons not inhabitants of, this Commonwealth, which does an express business, shall appoint an agent resident in Massachusetts, upon whom processes against such corporation or association may be served, as relates to incorporated express companies, is superseded by St. 1884, c. 330; the provisions regarding voluntary associations composed of inhabitants of other States are, however, still in force.

4. — Right to file Papers with Commissioners of Corporations 401

The Commissioner of Corporations may not receive for filing the papers of a foreign corporation engaged in the business of loaning money to its members, under a contract with each member that, upon the payment of a weekly premium, the company will loan to such mem-

FOREIGN CORPORATION—Continued.

ber, upon the maturity of his contract, a sum of money for the purchase of a home, such maturity being regulated by the numerical order of acceptance of the several contracts, for the reason that the transaction of such business by domestic corporations is forbidden by the provisions of R. L., c. 73, §§ 7, 8.

5. — Railroads—Purchase of Stock of Domestic Street Railway Company 420

A railroad incorporated under the laws of another State, carrying on business as a railroad within the Commonwealth, and authorized by its charter to invest in the stock of street railways wherever situated, even to the extent of a controlling interest therein, is not prohibited by the laws of this Commonwealth from acquiring the securities and assuming the ownership of domestic street railway corporations.

A railroad holding a charter from a foreign State, permitting the acquisition of stock in street railway companies, and also incorporated under the laws of this Commonwealth, would not have authority, in the absence of special legislative permission, to purchase the stock of street railway companies incorporated in this Commonwealth, such purchase, in the case of domestic corporations, being forbidden by R. L., c. 111, § 77.

6. — Interstate Commerce 440

Foreign corporations, operating steamship lines between Boston and ports in other States or in foreign countries, which do no transportation business wholly within the Commonwealth, and no other business therein except such as is incidental to their foreign business, are engaged in the business of interstate and foreign commerce, the regulation of which is vested exclusively in the Congress of the United States, and are not subject to the provisions of R. L., c. 126, §§ 4 and 6, requiring foreign corporations having a usual place of business within the Commonwealth to appoint the Commissioner of Corporations their attorney for the service of legal process, and to file in the office of such commissioner certain sworn statements concerning their capital stock.

— Insurance—Admission to transact Business in this Commonwealth . . . 64
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— Insurance company—Reinsurance . . . 123
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— Foreign Assessment Insurance Company—Employment of Paid Agents 214
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— Fire Insurance Company—Standard Policy 471
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— Express Company—Taxation—Interstate Commerce 493
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— Revocation of Authority of Foreign Fire Insurance Company to do Business within the Commonwealth 521
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— Fraternal Beneficiary Association—Admission to Commonwealth—Mortuary Assessment Rates . . . 524
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FUGITIVE FROM JUSTICE—Extradition—Sworn Evidence—Certification of Officer taking Oath . . . 414
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GAS AND ELECTRIC LIGHT COMMISSIONERS — Approval of —
Issues of Stock and Bonds . . . 58
See Gas Company. 2.

— Returns to — Voluntary Association . . . 8
See GAS COMPANY. 1.

GAS COMPANY — Voluntary Association — Returns to Gas and Electric Light Commissioners . . . 8

St. 1886, c. 346, § 2, providing that "manufacturing companies in which the manufacture of gas is a minor portion of their business shall only be required to keep accounts of the expenses and income of their gas business," was intended to exempt manufacturing corporations which carry on a gas business in addition to and entirely separate from their principal business, and does not apply to a company whose business is the manufacture of coal by one process into gas, coke and other by-products.

While a gas corporation becomes subject to the jurisdiction of the Board of Gas and Electric Light Commissioners as soon as it is incorporated, an unincorporated voluntary association has no greater rights and is subject to no greater duties or liabilities than an individual, and is not, therefore, subject to the jurisdiction of the Board, and is not required to make returns to the Board until it comes into actual relations with the gas consumers.

2. — Approval of Gas and Electric Light Commissioners to Issues of Stock and Bonds . . . 58

A gas company organized under the general laws of this Commonwealth is subject to the provisions of St. 1894, c. 450, requiring the approval of the Board of Gas and Electric Light Commissioners to issues of stocks and bonds, although all its business is carried on outside the limits of the Commonwealth.

3. — New England Gas and Coke Company — Unincorporated Association — Manufacture of Gas — Returns to Gas and Electric Light Commissioners . . . 311

The New England Gas and Coke Company, an unincorporated association of individuals, engaged in the manufacture and sale of gas to certain corporations for the purpose of sale and distribution to the public by the latter, is not itself engaged in the business of the sale and distribution of gas to consumers, and therefore is not subject to the jurisdiction of the Gas and Electric Light Commissioners in the matter of the returns prescribed by R. L., c. 121.

4. — Incorporation — Purpose of Organization — Distribution of Gas to Public . . . 346

An organization proposed to be incorporated for the purpose of manufacturing and selling coke, tar, ammonia, gas and other products of coal, but with no intent or purpose to engage in the business of distributing gas to the public, may incorporate under the provisions of R. L., c. 110, § 5.

GAS COMPANIES — Consolidation of . . . 36
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GOVERNOR . . . 118

The Governor has no authority to appoint an agent for the purpose of going to Europe to study the habits of the parasites of the gypsy moth, with a view to their introduction into this country.

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— Executive Discretion in Matters of Extradition . . . 368
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— Militia — Transfer of Company of Militia from One City or Town to Another . . . 411
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— Extradition — Expediency — Good Faith of Affidavit of Complaining Witness . . . 434
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— Veto Power of Executive — Passage of Bill or Resolve over Veto — Constitutional Law . . . 513
See LEGISLATURE. 2.

GOVERNOR AND COUNCIL — Claim against United States — Authority to appoint Agent of Commonwealth for Collection . . . 598

Under R. L., c. 6, § 79, authorizing the Governor, with the advice and consent of the Council, to appoint from time to time an agent to examine and prosecute, before any of the executive departments of the United States government, any accounts or claims of the Commonwealth against the United States, except claims for reimbursement of interest on war loans, the Governor and Council are not warranted in making a contract with any person to act as agent of the Commonwealth in the "collection" of a claim against the United States, since such statute does not authorize the appointment of an agent to present or prosecute before the courts or to actually collect such claim.

— Approval of Orders or Regulations of Chief of Cattle Bureau — Publication . . . 425
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GREAT PONDS — Public Right of Fishing — Commissioners on Inland Fisheries and Game . . . 223

Since great ponds are the property of the Commonwealth, and fishing in them is free to the public excepting when otherwise provided by the Legislature, a statute which limits the right of citizens to fish in great ponds is derogative of the rights of citizens generally, and is to be strictly construed.

GREAT PONDS—Continued.

When a great pond has been stocked and the fishing therein regulated for a period "not exceeding three years," under St. 1897, c. 208, the Board of Commissioners of Inland Fisheries cannot, after the expiration of such term, again stock and regulate the fishing in such pond under the provisions of that statute.

2. — Public Rights — Water Supply — Harbor and Land Commissioners — Approval of Structures . . . 232

A statute which gives to a town the exclusive and unlimited right to use the waters of a great pond as a source of water supply does not further diminish the rights of the public in such pond.

The public is, therefore, still interested in the pond, and, since the purpose of requiring the approval of the Board of Harbor and Land Commissioners for structures upon and changes in great ponds is the protection of public rights therein, it follows that the town must submit to the Board, for its approval, plans contemplating work of that nature.

3. — Source of Water Supply — Public Rights — Fishing — Town . . . 239

A statute authorizing a town to take and hold the waters of a great pond for the purposes of a water supply does not take away any public rights therein, except so far as they are necessarily lost in the exercise of the right conferred upon the town to use the waters of the pond as a source of water supply.

It follows that the town has no right to obstruct the passage of fish to and from such pond, unless its waters are thereby rendered unsuitable for drinking purposes.

4. — Title to Islands — Board of Harbor and Land Commissioners . . . 307

The title to islands within the area of great ponds is, in the absence of any grant from the Legislature, or from the freemen of a town prior to 1647, in the Commonwealth, and the duties of the Board of Harbor and Land Commissioners relating to such islands are prescribed by Revised Laws, c. 96, § 3.

5. — Sources of Water Supply — Rules and Regulations of State Board of Health — Commissioners of Fisheries and Game — Duty to Stock with Food Fish . . . 552

Rules and regulations established by the State Board of Health, under the provisions of R. L., c. 75, § 113, "to prevent the pollution and to secure the sanitary protection of all such waters as are used as sources of water supply," are police regulations, and, in the case of a great pond so used, will limit and control the right of the public to the use thereof for boating, fishing or other like purposes, so far as such use by the public is inconsistent with the use of such pond as a source of water supply.

Where rules and regulations established by the State Board of Health, under the provisions of R. L., c. 75, § 113, relating to a great pond

GREAT PONDS—Continued.

used as a source of water supply, forbid to the public fishing, boating or bathing therein or taking ice therefrom, the provisions of R. L., c. 91, § 19, directing the Commissioners of Fisheries and Game, upon petition duly made as prescribed, to cause the waters of any great pond to be stocked with food fish, and to make reasonable regulations relative to the fishing therein, is not applicable, and such commissioners are not required to act thereunder.

GUARANTY — Authorized Investment for Savings Banks . . . 257
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GYPSY MOTH — Agriculture, State Board of — Agent to investigate Parasites of, outside the Commonwealth . . . 118

The Board of Agriculture may not send an agent to Europe to study the habits of the parasites of the gypsy moth, with a view to their introduction into this country.

GYPSY AND BROWN-TAIL MOTHS — Suppression and Destruction — Superintendent — Local Boards of Health — Public Nuisance — Cities and Towns — Local Officers — Compulsory Suppression . . . 589

The provisions of St. 1905, c. 381, "An Act to provide for suppressing the gypsy and brown-tail moths," are not applicable to local boards of health, and such boards cannot take action to suppress such moths in their various stages of development, as constituting a public nuisance.

It is the duty of the Superintendent for the Suppression of Gypsy and Brown-tail Moths to deal with the officers of cities and towns who have been appointed, under color of authority, to act therefor; and he is called upon to determine the legality of such appointments.

St. 1905, c. 381, § 3, does not make compulsory the destruction by cities and towns of gypsy and brown-tail moths within their respective limits; but the reimbursement therein provided for extends to and includes all acts done by such cities and towns, under the advice or direction of the superintendent, for the purpose of destroying such moths.

The superintendent may, under the provisions of St. 1905, c. 381, § 3, within the limits of the appropriation provided therein, suppress gypsy and brown-tail moths within a city or town which has made the maximum expenditure authorized by such act, and may employ the local force therefor, or organize a new force of agents or employees under his immediate control. Such superintendent may also organize a force, and undertake the work of suppressing and destroying such moths, in cities and towns refusing to prosecute the work required by such statute.

St. 1905, c. 381, § 5, does not require property owners to undertake any work against the "caterpillars" of the gypsy or brown-tail moth.

GYPSY AND BROWN-TAIL MOTHS

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2. — Suppression and Destruction —
Cities and Towns—Gross Amount
of Expenditures—Reimburse-
ments—Contiguous Lands . . . 594

St. 1905, c. 381, § 5, defines the gross amount which the Superintendent for the Suppression of the Gypsy and Brown-tail Moths may require cities and towns to expend for the purposes set forth in such statute, and no deductions are to be made on account of reimbursements.

Lands owned by one owner on two sides of a public highway are contiguous within the meaning of St. 1905, c. 381, § 6, providing that when, in the opinion of the mayor or selectmen, the cost of destroying eggs, pupæ and nests of gypsy or brown-tail moths, "on lands contiguous and held under one ownership in a city or town," will exceed one half of one per cent. of the assessed value of such lands, a part of such lands only may be designated for such purpose.

3. — Superintendent—Rules and Regu-
lations—Infested Cord Wood . . . 617

Under St. 1905, c. 381, § 3, authorizing the Superintendent for Suppressing Gypsy and Brown-tail Moths to "make rules and regulations," such superintendent is not authorized to make rules and regulations requiring owners about to transport cord wood infested with the gypsy moth to have such cord wood examined and treated before transportation, his power in the premises being limited to the establishment of rules and regulations for the examination by his agents of all cord wood in an infested district, and the destruction of any nests found therein before such wood may be transported.

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- HEALTH, BOARDS OF—Cities and
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- HEALTH, STATE BOARD OF.**
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- HIGH SCHOOL—Manual Training
School—Payment of Tuition by
Town—Mechanic Arts High
School of Springfield . . . 98**

The Mechanic Arts High School of Springfield is not a high school within the meaning of St. 1898, c. 496, § 3, and the town of East Longmeadow is not required to pay the tuition of a child residing therein and attending such school. If it sees fit to pay it, it cannot ask reimbursement therefor from the treasury of the Commonwealth.

2. — Length of Course of Study—
Tuition—Payment by Town . . 451

The effect of the provision in R. L., c. 42, § 2, that in a high school established thereunder "one or more courses of study, at least four years in length, shall be maintained," is to fix a minimum and not a maximum length for such course, and, in the discretion of the school committee, the course of study thereat may be made to exceed four years in length.

Under R. L., c. 42, § 3, providing that towns relieved of the duty to maintain a high school of their own shall pay the expenses of tuition of residents therein who attend high schools in other towns, a pupil residing in a town which does not maintain a high school, and attending a high school elsewhere, who fails to graduate in due course, may be allowed a reasonable time in excess of that prescribed for the completion of such course; or such pupil, if graduated in due course, may pursue an additional or post-graduate course for the purpose of securing admission to a State normal school, technical school or college, provided such additional course includes only studies required by law to be taught in high schools.

On the other hand, a pupil resident in a town in which no high school is maintained, and attending a high school in another town, who pursues an additional or post-graduate course which includes studies not required to be taught in high schools of corresponding grade, cannot be reimbursed by the town of his residence for the expense of tuition incurred in taking such course.

HIGHWAYS—Street Railways as Common Carriers of Goods, Wares and Merchandise—Owner of Fee . . . 263
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HOLYOKE WATER POWER COMPANY—Contract—City of Holyoke—Assessors—Valuation of Property . . . 161

The approval by the Legislature of a contract between the city of Holyoke and the Holyoke Water Power Company, providing that the company shall have certain rights "subject to such provisions of the general laws of Massachusetts now in force" as relate to such rights, will not serve to exempt the company from the operation of such laws thereafter enacted as affect any rights or duties of the company as they exist under the laws now in force.

A clause in such contract which provides that the price fixed in a lease for the use of lighting apparatus shall be increased or decreased as the values put upon the property by the assessors increase or diminish, is not in conflict with the general laws of the Commonwealth relating to taxation, since it does not bind the assessors, who are not agents of the city, but a board of public officials acting under the authority of the statutes of the Commonwealth.

HOUSE OF REPRESENTATIVES—Authority to require Opinions of Attorney-General—Limitation of Time—List of Special Legislation 125
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INLAND FISHERIES—Commissioners on—Stocking of Great Ponds . 223
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INQUEST—Employment of Stenographer 112
A justice of a district court has no authority to employ a stenographer to report the evidence at an inquest held by him, at the expense of the county, except possibly in the case of an inquest into the conduct of an election, under St. 1898, c. 548, §§ 304-310.

District attorneys, by virtue of their general powers as prosecuting officers, may order the testimony taken at an inquest when crime is suspected, and written out for their subsequent use, at the expense of the county.

INSANE PERSON—Escape—Recapture—Discharge . . . 122

It is the duty of the superintendent of a hospital to which an insane person has been com-

INSANE PERSON—*Continued.*
mitted by the court to retake such person if he escapes.

There is no statute or rule of law which limits the time within which such insane person may be legally retaken. If the facts required by Pub. Sts., c. 87, § 40, are found to be true, a person who has been committed to the State Insane Hospital may be discharged by the trustees, whether he is at that time actually in custody or has escaped.

— Transfer to State Almshouse—Notice 228
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INSANITY, STATE BOARD OF—Jurisdiction over Insane Paupers committed subject to Orders of Court . . . 92
See **PAUPER**. 8.

INSPECTOR OF ALMSHOUSES—Eligibility of Member of Legislature for Office of . . . 194
See **LEGISLATURE**. 1.

INSURANCE—Insurance Agent—License . . . 2

The authority of a person duly appointed by an insurance company, and licensed by the insurance department of the Commonwealth, as an insurance agent, is ordinarily personal in its nature, and cannot be transmitted to another.

The question whether the authorized agent of an insurance company can delegate to another the power of countersigning a policy is one which does not concern the insurance department of the Commonwealth.

2. — Reinsurance—Single Hazard . . . 34

The prohibition of St. 1894, c. 522, § 20, against insuring in a single hazard a larger sum than one-tenth of the net assets of the company, is not met by reinsuring such hazard so far as to bring the net amount of the risk within the prescribed limit.

Nor does it make any difference that the company taking the risk is one of a syndicate of companies, with the others of which it has contracts whereby each one of them becomes liable for its portion of the risk not exceeding the ten per cent. limit. Such a transaction is in fact reinsurance.

3. — Fire and Marine Insurance—Foreign Corporation—Admission to Commonwealth—Certificate . 64

A foreign insurance company, authorized by its charter to do both fire and marine business, was admitted to do business in this Commonwealth in 1874, but it could then do only fire business here, as its capital was only \$200,000. It has since increased its capital to \$300,000, and it may now do both fire and marine business in this Commonwealth.

No duty devolves upon the Insurance Commissioner of granting permission to it now to do marine business, as there never has been any statute that authorized the Insurance Commissioner to state in the certificate of admission

INSURANCE—Continued.

which he gave to a foreign company any one kind of business it might do. So, after a company is once admitted, it may do any business here that its charter and the laws of the Commonwealth permit.

4. — Foreign Insurance Company—Re-insurance—Resident Agent . . . 123

A foreign insurance company doing business in this Commonwealth is not required, in case it desires to reinsure a risk, to take out its policy of reinsurance by and through an agent resident in this Commonwealth.

5. — Reinsurance—Form of Contract . . . 157

A contract for reinsurance is not a contract of insurance "on property," within the meaning of St. 1894, c. 522, § 60, and such contracts entered into by insurance companies need not be in the standard form required by that section.

6. — Surrender of Policy—Rebate . . . 167

Where an insured holding an assessment policy has contributed \$10 per \$1,000 of insurance to a "safety fund," in which both the insured and the insuring company have interests, a transaction by which the policy holder receives a new "old line" policy as of the date of his assessment policy in consideration of the surrender of the latter, and an allowance of \$10 per \$1,000 of new insurance upon his first premium in consideration of the surrender of his interest in the safety fund, is not a "rebate" within the meaning of St. 1894, c. 522, § 68.

7. — Fraternal Beneficiary Corporations—Benefit Certificate—Form of Contract—Reserve Fund . . . 212

St. 1899, c. 442, relating to fraternal beneficiary corporations, regulates the form of the contract between the company and the certificate holder, by providing that such contract shall specify, that the latter shall only receive the amount collectible by an assessment upon the members, regardless of the amount named in the certificate, except that when the corporation has, at the time when the certificate is payable, a reserve fund upon which it has the right to draw, the whole amount may be paid.

8. — Fraternal Beneficiary Corporation—Employment of Paid Agents—Foreign Assessment Insurance Company . . . 214

The features of fraternal beneficiary associations which distinguish them from assessment insurance companies are the nonemployment of paid agents and the conduct of business upon the lodge system. Any insurance company, therefore, which elsewhere than in this State employs paid agents to solicit business, is not a fraternal beneficiary association within the meaning of the term as used in the statutes of Massachusetts, even though such agents are not employed in Massachusetts, but is, in effect, an assessment insurance company, and, as such, is not entitled to do business within this Commonwealth.

INSURANCE—Continued.

9. — Nature of Contract—Medical Attendance . . . 226

An agreement by which a corporation, in consideration of a weekly payment, undertakes to furnish medical attendance to the person with whom the contract was made, and to have filled and furnished prescriptions for medicine that may be prescribed by the physician, it being stipulated that the corporation furnishes the physician, is not a contract of insurance.

10. — Change from Assessment to "Old Line" Business—Reserve—Asset—Lien on Policy . . . 251

Where an insurance company, in changing from an assessment to a level premium business, enters into an agreement with the insured, by which the latter exchanges an assessment for a new level premium policy, as of the date of the original insurance, giving to the company a lien upon the new policy for the amount of the reserve which would have accumulated if such policy had been taken out at the time when the assessment insurance was taken, the amount of the lien is not an asset of the company, and is not to be credited to it as such.

It is therefore the duty of the Insurance Commissioner to regard the contract as a contract of insurance for the face value of the policy, less the amount of the lien created thereon.

11. — Insurance Broker—License—Clerk or Employee . . . 283

A salaried clerk or other employee of a duly licensed insurance broker, who is not himself so licensed, cannot lawfully do any of the acts forbidden to persons not licensed as insurance agents or brokers. He cannot, under pretence of being a clerk, act as solicitor or broker of insurance, excepting so far as such work is under the immediate direction of his employer, and is incidentally a part of his work as clerk.

12. — Accident Insurance Policy—Liability of Physician for Accident to Patient . . . 289

Injury or death caused by the mistake, inadvertence or error of a physician, is, so far as concerns the patient, an accident, and a policy issued to physicians insuring them against loss from common law or statutory liability for damage on account of bodily injuries, fatal or non-fatal, suffered by any person or persons in consequence of any alleged error or mistake made by the physician to whom such policy is issued, is insurance against loss or damage on account of "bodily injury or death by accident," within the meaning of clause 5, of St. 1894, c. 522, § 29, and is therefore legal.

13. — License as Insurance Agent—Corporation . . . 299

A corporation is not a "person" within the meaning of St. 1894, c. 522, § 93, cl. 2, as amended by St. 1895, c. 59, § 2, providing that, upon payment of a fee of ten dollars, the Insurance Commissioner may issue to any "suitable person" a license to act as insurance broker.

INSURANCE — Continued.**14. — Fraternal Beneficiary Corporation — Supreme Lodge — By-laws — Amendments — Management of Funds . . . 347**

R. L., c. 119, regulating the conduct of business by fraternal beneficiary corporations, requires that the supreme lodge or council shall be responsible for and have possession of the several funds provided for by law, and shall regulate the rates of assessments and the amounts of death or disability benefits to be paid; and a fraternal beneficiary corporation carrying on business under the provisions of such statute cannot amend its by-laws so as to provide that a member of the association shall be entitled to a sick benefit to be paid by the subordinate lodge of which the holder of the certificate is a member, from funds collected by each subordinate lodge from its own members.

15. — Annual Returns of Insurance Companies — Public Documents . . . 381

Annual statements of insurance companies, filed in the office of the Insurance Commissioner, according to the provisions of R. L., c. 118, § 96, are papers which the Insurance Commissioner is by law required to receive for filing within the intention of R. L., c. 35, § 5, and are therefore open to inspection as public documents.

16. — Cities and Towns as Insurers against Fire — Legislature — Constitutional Law . . . 419

The Legislature may not constitutionally authorize cities and towns to establish fire insurance departments, and to act as insurers against fire of all insurable property within their limits. It follows, therefore, that House Bill, No. 386, entitled "An Act to authorize cities to insure property against loss by fire," would, if enacted, be unconstitutional and void.

17. — Standard Policy — Foreign Corporation — Fire Company — Contract 471

A fire insurance company organized under the laws of another State, and not admitted to do business in this Commonwealth, may, without violating any of the provisions of R. L., c. 118, issue a policy differing in form from the standard policy of fire insurance established by such statute, if the contract of insurance is made and the policy delivered without the Commonwealth, and no person acts as agent or broker within the Commonwealth in negotiating the contract.

18. — Foreign Corporation — Burial Association . . . 480

A so-called "burial association," which assesses its members, and, upon the death of a member, furnishes the services of an undertaker and the supplies incidental to a funeral to the value of \$100, is an insurance company within the meaning of R. L., c. 118, § 65, and is subject to the provisions of the insurance laws.

Such an association, incorporated under the laws of a foreign State, would not be permitted

INSURANCE — Continued.

to enter the Commonwealth under the provisions of R. L., c. 126, § 2, relating to foreign corporations, for the purpose of doing the business for which it was incorporated.

19. — Reinsurance — Authority of Foreign Fire Insurance Company to do Business within the Commonwealth — Revocation . . . 521

When it appears that a foreign fire insurance corporation admitted to do business in this Commonwealth has reinsured risks on Massachusetts property in fire insurance companies not so admitted, without filing the affidavit required by R. L., c. 118, § 83, to the effect that the amount of insurance adequate to protect the property could not be obtained in companies regularly admitted to do business in Massachusetts, the Insurance Commissioner may, under R. L., c. 118, § 20, revoke the authority of the corporation to carry on business here, notwithstanding that the contract of reinsurance was made and was to be performed beyond the limits of the Commonwealth.

20. — Foreign Corporation — Admission to Commonwealth — Fraternal Beneficiary Corporation — Mortuary Assessment Rates . . . 524

A foreign fraternal beneficiary association which was not doing business in the Commonwealth on May 23, 1801, and which does not at the time of its application have in force mortuary assessment rates not lower than those indicated as necessary by the National Fraternal Congress Mortality Tables, as required by R. L., c. 119, § 13, may not be admitted to carry on business within this Commonwealth.

21. — Fire Insurance — Massachusetts Standard Policy — Modifications — Binding Slips — Riders — Insurance Commissioner . . . 545

R. L., c. 118, § 60, does not forbid the making of a special contract inconsistent with the terms of the standard form of fire insurance policy therein contained, and in clause 7 expressly provides for such modification of the standard form as the parties themselves may choose to make; it follows, therefore, that a separate slip or "rider," complying with the provisions of statute applicable thereto, may provide for cancellation upon less than ten days' notice required by the standard form.

A fire insurance company is not required to make temporary insurance by means of "binding slips," by which an agent is authorized to cover property with insurance from the moment of application until the applicant either receives his policy or is notified of the rejection of his risk, and such insurance may be terminated in any manner agreed upon by the parties.

The Insurance Commissioner is not required to pass upon or consider questions relating to the form or contents of the "binding slips" above mentioned.

INSURANCE—Continued.

22. — Standard Fire Insurance Policy —
Mortgaged Policy — Referees —
Appointment — Notice — Insurance
Commissioner 582

Under a fire insurance policy in the Massachusetts standard form required by R. L., c. 118, § 60, where the damaged property is mortgaged and the insurance is payable to the mortgagee, the Insurance Commissioner should not, on the application of the mortgagor, appoint a third referee unless the mortgagee joins in the request for such appointment.

A referee chosen by the mortgagor, without the concurrence of the mortgagee, is not duly chosen, and the Insurance Commissioner should not act upon his request for the appointment of a third referee.

R. L., c. 118, § 60, providing that, upon appointment of a third referee, the Insurance Commissioner "shall send written notification thereof to the parties," requires such commissioner to notify not only the insurance company and the mortgagor, but also the mortgagee, or the two referees as the representatives of such parties.

- INSURANCE BROKER—License—**
Clerk 283
See INSURANCE. 11.

INSURANCE COMMISSIONER.
See INSURANCE.

INTERNAL REVENUE LAW 86
Registers of probate and insolvency are not required to pay for internal revenue stamps affixed to certificates and certified copies furnished by them, nor is the Commonwealth. When a stamp is required upon a document furnished by them, it must be paid for by the person for whose use it is issued.

Congress has no authority to tax the States, and it is the duty of the Treasurer of the Commonwealth to refuse to reimburse officers of the Commonwealth for money expended by them for revenue stamps.

- INTERSTATE COMMERCE—Boston
& Albany Railroad Company—**
Constitutional Law 125
See LEASE. 1.

- Steamship Lines 440
See FOREIGN CORPORATION. 6.

- Taxation of Foreign Express Company 493
See TAXATION. 2.

INTOXICATING LIQUORS—Importation and Sale in Original Package 436
The Legislature, since the enactment of 26 U. S. Sts. At Large, 313, providing that "all fermented, distilled or other intoxicating liquors or liquids transported into any state or territory . . . shall, upon arriving in such state or territory, be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers, to the same

INTOXICATING LIQUORS—Continued.

extent and in the same manner as though such liquids or liquors had been produced in such state or territory," has authority to repeal R. L., c. 100, § 33, which permits the sale of intoxicating liquors in the original casks or packages of importation, and to enact laws subjecting the possession, use or sale of such liquors within the limits of the Commonwealth, to all the restrictions and penalties imposed upon the possession, use or sale of other intoxicating liquors therein.

2. — Certificate—Evidence—State
Board of Health 450

The provision of R. L., c. 100, § 67, which made the certificate of the State inspector and assayer of liquors *prima facie* evidence of the composition and quality of liquors examined by him, is not affected as to the competency of such certificate as evidence by the fact that under St. 1902, c. 110, the office of State inspector and assayer of liquors was abolished, and the powers and duties of such officer were transferred to the State Board of Health.

- Sale by Foreign Corporation 55
See FOREIGN CORPORATION. 2.

- Registered Pharmacy—Alcohol—
Transportation 621
See REGISTERED PHARMACIST. 6.

INVESTMENTS—Authorized for Savings Banks—Bonds of Chicago Burlington & Quincy Railroad Company 43
See SAVINGS BANKS. 2.

- Savings Banks—First Mortgage of
Real Estate 593
See SAVINGS BANKS. 6.

- Savings Banks—Bonds of the Bangor
& Aroostook Railroad Company . 619
See SAVINGS BANKS. 7.

**IPSWICH—Feoffees of Grammar School
—Vested Rights—Obligation of
Contract 354**
See CONSTITUTIONAL LAW. 6.

- ISLANDS—In Great Ponds—Title 307**
See GREAT PONDS. 4.

- LABOR—Hours of—Nine-hour Law—
Preference of Citizens—Weekly
Payments 175**

The word "preference," as used in St. 1895, c. 488, § 31, requires the employment of citizens only when they can be employed upon as advantageous terms as aliens.

Where laborers are regularly employed by contractors upon public works for more than nine hours per day, payment being per hour for the time during which they actually work, it is not a violation of St. 1899, c. 508, § 7.

Even where the laborers are told that they can only be employed upon their agreement to

LABOR — *Continued.*

work more than nine hours per day, for so much per hour, and they accept the employment upon such terms, it is not a violation of that statute.

The statute requiring the weekly payment of employees (St. 1894, c. 508, §§ 51-54, amended by St. 1899, c. 247) does not include the employment of labor by the Commonwealth or its officers.

2. — Hours of — Street Railway Employees — "Day's Work" . . . 388

A special contract made by a street railway company and its employees, providing for employment and compensation by the hour, and not aggregating the service under the designation of a "day's work" as a unit, is not within the provisions of R. L., c. 106, § 22, setting forth what shall constitute a day's work for all conductors, drivers and motormen employed by street railway companies.

3. — Hours of — Public Works — Constitutional Law . . . 497

It would seem, in view of the decision of the Supreme Court of the United States in *Atkins v. Kansas*, 191 U. S. 207, that a proposed bill regulating the hours of labor of workmen employed by the Commonwealth, by the several counties and by certain cities and towns, or by persons contracting with the Commonwealth, the counties and such cities and towns, would not, if enacted, be open to objection upon constitutional grounds.

4. — Person committed to Workhouse — Commitment . . . 548

The word "commitment," as used in R. L., c. 30, § 21, providing that "every person who has been committed to a workhouse shall, if able to work, be kept diligently employed in labor during the term of his commitment," is to be broadly interpreted, and such provision is applicable not only to persons committed to a workhouse by a court, but also to persons placed therein subject to the care and oversight of overseers of the poor, and without a technical commitment.

— Hours of — Employees of Commonwealth — Office Work . . . 475
See COMMONWEALTH. 4.

LANDS — Suppression and Destruction of Gypsy and Brown-tail Moths — Cities and Towns — Gross Amount of Expenditures — Reimbursement — Contiguous Lands . . . 594
See GYPSY AND BROWN-TAIL MOTHS. 2.

LAW LIBRARY ASSOCIATION — County Accounts — Title to Money drawn from County Treasurer . . . 3

The Norfolk Bar Association was organized in January, 1898, and was entitled to receive the full amount appropriated under Pub. Sta., c. 40, § 6, as amended by St. 1882, c. 246, on the first

LAW LIBRARY ASSOCIATION — *Continued.*

day of January, 1899, although its by-laws were not approved by the Superior Court until November, 1898.

LEASE — Boston & Albany Railroad Company — Corporation — Charter — Rights of Commonwealth to regulate Traffic and acquire Property of Railroad — Constitutional Law — Impairing Obligation of Contract — Interstate Commerce — Waiver — Assignment of Lease — Public Policy — House of Representatives 125

The Boston & Albany Railroad Company, incorporated under the laws of both New York and Massachusetts is, so far as the restrictions, duties and obligations imposed upon the Boston & Worcester Railroad Company and the Western Railroad Company, its constituent domestic corporations, by their charters, are concerned, within and subject to the jurisdiction of the Commonwealth as though it were incorporated wholly under the laws of Massachusetts.

The jurisdiction of the State to regulate rates of traffic is limited to such traffic as begins and ends within its borders.

The charters of the Boston & Worcester Railroad Company and the Western Railroad Company contained a contract whereby the Commonwealth agreed that it would not exercise its power of regulating rates of traffic so as to reduce the profits below ten per cent. per annum. The obligation of this contract subsists, notwithstanding the provision of Pub. Sta., c. 112, § 180, that traffic rates shall at all times be subject to alteration by the Legislature, unless the corporation has waived its right under its original charters.

By accepting the benefit of legislation giving it additional privileges during the existence of general laws inconsistent with its original charters, the corporation has subjected itself to all the provisions of such general laws. The Commonwealth, therefore, has the right to regulate the rates on the Boston & Albany Railroad, although dividends are thereby reduced below eight per cent. per annum.

The Legislature may reserve this right to the Commonwealth, while ratifying the proposed lease of the Boston & Albany Railroad to the New York Central & Hudson River Railroad Company.

The Commonwealth may acquire the property of the Boston & Albany Railroad either by eminent domain or by purchase. The compensation in the first case would be the fair net cash value of the property taken, which would include only the property necessary to the carrying on of the railroad business; in case of purchase, the Commonwealth must pay such sum as would reimburse to the road "the cost of making the railroad," with a net profit thereon of ten per cent. a year.

If the Commonwealth assents to the proposed lease, it does not expressly or by implication waive or surrender any rights reserved to it under existing laws.

LEASE — Continued.

The sum of \$5,500,000, the proceeds of property belonging to the lessor sold by it to the lessee, should be deducted from the damages in case of taking, and from the price to be paid in case of purchase.

Questions of public policy are peculiarly within the province of the Legislature, and the Attorney-General is not authorized to express an opinion upon them.

The bonds acquired by the Boston & Albany Railroad under the terms of the lease and agreement, when ratified by the Commonwealth, will become the absolute property of the corporation; and the interest of the bonds may be divided among the stockholders, or the bonds may be sold and the proceeds divided.

The lessee under the proposed lease has no authority to assign its lease or to underlet the lines of the Boston & Albany Railroad or any of the branches acquired by the lease. Such lease, though it may be annulled by the joint action of the contracting parties, cannot be modified, changed or amended by them without the consent of the Commonwealth.

But *quare*, as to the remedy of the Commonwealth if the lessee should assign the lease.

Such obligations as are now incumbent upon the Boston & Albany Railroad under the Public Statutes will continue in full force under the proposed lease. The duty of complying with the provisions of St. 1893, c. 131, will fall upon the lessee, and not upon the lessor.

2. — Of Boston & Albany Railroad Company — Issue of Stock . . . 196

So long as the proposed lease of the Boston & Albany Railroad Company may remain in force, there is no authority in any person or corporation to issue the balance of stock provided for in St. 1889, c. 163.

3. — Boston & Albany Railroad Company
— Legislature — Amendment of Lease — Consent of Commonwealth — Violation of Conditions — Revocation — Lessee subject to General Laws — Special Burdens — Contract — Interstate Freight Traffic — Constitutional Law . . . 198

Since the lease of the Boston & Albany Railroad Company is to form a contract between the parties, the Legislature cannot, by enactment, amend it.

The consent of the Commonwealth to such lease is in the proposed statute, conditioned not upon the performance by the lessee of the obligations imposed, but upon the obedience of the lessee to a decree of the Supreme Judicial Court requiring such performance, which could be made only upon a finding that the lessee had assumed the duty for the neglect of which complaint is brought. No such duty having been assumed by the lessee, by agreement or otherwise, under this bill, the court would be without authority to decree its performance, and consequently the Legislature could not revoke its consent.

If the lessee, a foreign corporation, by the

LEASE — Continued.

consent of the Commonwealth enters upon the exercise of a franchise within the jurisdiction of the Commonwealth, it subjects itself to all such general laws as the Legislature may constitutionally enact regulating the conduct of such franchise.

With regard to independent enactments, involving special burdens, the Legislature may impose conditions which accomplish the desired result if a contract for their performance is entered into by the lessee, either expressly or by implication.

If the lessee elects, under the conditional consent of the Commonwealth, to become bound under the lease, it also becomes bound by implication to perform the conditions upon which such consent is given.

A regulation by the Commonwealth of rates of freight from points without to points in and through the State is unconstitutional and void.

A private person, however, may make contracts with a railroad corporation, with reference to freight, that are not in violation of any act of Congress; and it would seem that the Commonwealth as a party would have the same right that a private individual would have to make a contract relating to interstate freight rates, subject to the regulations of Congress upon the subject.

4. — Boston & Albany Railroad Company
— Modification of Leases — Acceptance by Lessee — Consent of Commonwealth — Foreign Corporation — Financial Affairs . . . 206

A provision in the proposed statute to ratify the lease of the Boston & Albany Railroad Company, stipulating that the consent of the Commonwealth is not to take effect until the conditions imposed by the Commonwealth are accepted by the lessee by a corporate vote, is the most effectual way to insure the performance of the conditions by the lessee, and to reserve the right of revocation by the Commonwealth upon the failure of such performance.

The lease itself cannot be cancelled, amended or modified by the parties without the further consent of the Commonwealth.

The lessee, being a foreign corporation, is subject to the paramount authority of the State granting its charter, and its financial affairs cannot be made subject to direct legislation by this Commonwealth.

5. — Assignment — Covenants — Harbor and Land Commissioners . . . 236

When a lease is assigned and the assignee enters under it, he becomes tenant of the lessor, and is bound by all the covenants of the lease which are not personal to the lessee.

When, therefore, a lessee of the Harbor and Land Commissioners assigns his lease, an agreement to perform the covenants of the lease by the assignee is unnecessary.

— For Ninety-nine Years — Savings Bank 23
See SAVINGS BANKS. 1.

LEGACY TAX ACT—Postponement of
Tax — Non-resident Decedents —
Intervening Life Estate . . . 373

The provisions of St. 1902, c. 473, are not applicable to the estates of non-resident decedents.

The statute postpones the time when the legacy tax shall become due upon a taxable remainder until the time when such remainder vests in the remainderman, without reference to the character of the life estate which precedes it.

LEGISLATURE — Member of — Eligibility for Other Office . . . 194

The provisions of chapter 2, section 33, of the Public Statutes, do not prevent the State Board of Charity from appointing a member of the Legislature as its agent to inspect almshouses, in accordance with St. 1900, c. 215, since such office is not a public office within the meaning of that section.

2. — Veto Power of Executive — Passage of Bill or Resolve over Veto —
Two-thirds of Branch originating Measure — Constitutional Law . . . 513

The Constitution of Massachusetts, Part II., chapter I., article II., by providing that, where the veto power of the Executive is exercised, the bill or resolve, with his objection thereto in writing, shall be returned to that branch of the Legislature in which such bill or resolve originated, two-thirds of which branch may upon reconsideration agree to pass the same, and if approved in the other branch by two-thirds of the members present it shall have the force of a law, — imposes upon that branch of the Legislature in which a particular act originates a different relation to and responsibility for such act from that attaching to the other branch, and requires that "two-thirds of the said Senate or House of Representatives," whichever may have originated the measure, should be two-thirds of the full membership thereof, and not merely two-thirds of the members present, as in the case of the remaining branch.

It follows that St. 1904, c. 458, which originated in the House of Representatives, and which was therein passed over the veto of the Executive by a two-thirds vote of the members then present, but not by a two-thirds vote of its entire membership, was not passed over such veto in accordance with the provision of the Constitution (Part II., chapter I., article II.), and is null and void.

The Treasurer has no authority, therefore, to issue the bonds authorized and required by the terms of such statute.

— Amendment of Lease of Boston & Albany Railroad Company . . . 198
See LEASE. 3.

— Power to authorize Cities and Towns to insure against Fire — Constitutional Law . . . 419
See INSURANCE. 16.

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— New York, New Haven & Hartford Railroad Corporation — Control —
Forfeiture of Charter — Acquisition of Stock in, and Control of Domestic Street Railway Corporation by, Foreign Corporation — Attorney-General . . . 570
See NEW YORK, NEW HAVEN & HARTFORD RAILROAD CORPORATION.

LICENSE — Firemen — Coal Shovellers in Large Boiler Plant . . . 62
Men employed in simply putting coal under the boilers in a large boiler plant, subject to the orders and directions of a licensed fireman, whose duty it is to take care of the water for the boilers and direct the men in their work, are not required, by St. 1899, c. 368, to have licenses.

2. — To construct Pier — West's Beach Corporation — Board of Harbor and Land Commissioners — Ultra Vires Act . . . 193

The Board of Harbor and Land Commissioners may grant to the West's Beach Corporation a license to construct a pier on and over its beach into tide water, for the purpose of increasing the landing facilities for boats.

Whether the construction of such wharf, as proposed by the corporation, would be ultra vires, is not a question within the scope of the duties of the Board.

There would seem to be no reason, however, why the corporation may not, if licensed by the Board, construct such wharf, its object being merely to facilitate the members of the corporation in their lawful occupation of the beach.

3. — Engineers and Firemen — Citizenship of Applicant . . . 477

An applicant for a license under the provisions of R. L., c. 102, § 81, to act as engineer or fireman, is entitled to be examined, and, if found competent, to receive his license, notwithstanding the fact that he is not a citizen of this Commonwealth, and that his residence therein appears to be only temporary.

— Insurance Agent . . . 2
See INSURANCE. 1.

— Fish Weirs . . . 25
See FISH WEIRS.

— Registered Pharmacist — Clerk . . . 282
See REGISTERED PHARMACIST. 3.

— Clerk or Other Employee of Insurance Broker . . . 283
See INSURANCE. 11.

— Insurance Agent — Corporation . . . 299
See INSURANCE. 13.

— From Local Authorities for Planting and Cultivation of Oysters . . . 431
See OYSTERS.

LICENSE — Continued.

— Suspension of License or Certificate of
Registration of Registered Pharm-
macist — Conviction . . . 482
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— Pedlers' License — Fee for Transfer . 610
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— Intoxicating Liquors — Registered
Pharmacist — Copartnership . . 621
See REGISTERED PHARMACIST. 6.

LIEN ON POLICY — Of Insurance —
Asset — Reserve . . . 251
See INSURANCE. 10.

**LITHUANIAN ST. KAZINER BENE-
FIT SOCIETY** — Right to parade
with Side Arms . . . 333
See MILITARY ORGANIZATION.

LOAN — To Single Individual by Trust
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— Co-operative Savings Bank — Secur-
ity — Second Mortgage . . . 462
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LOCKS — Location of, on Cape Cod Ca-
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MAINTENANCE — Cost of, of State
Highway . . . 195
See STATE HIGHWAY. 6.

MANUAL TRAINING SCHOOL — Pay-
ment of Tuition at, by Town —
Mechanic Arts High School at
Springfield . . . 98
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poration . . . 64
See INSURANCE. 3.

MARRIED WOMAN — Settlement.
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**MASSACHUSETTS AGRICULTURAL
COLLEGE** — Rates of Tuition . 84
The trustees of the Massachusetts Agricul-
tural College may establish such rates of tuition
and remit them in such cases as they deem to
be for the interests of the college.

2. — Funds derived from Proceeds of Sale
of Public Lands — Payment of In-
terest by Commonwealth . . . 359
The obligation imposed upon the Common-
wealth by St. 1863, c. 166, accepting the pro-
visions of the United States statute of June 2,
1862 (12 U. S. St., c. 130), to pay to the Massa-
chusetts Agricultural College interest upon the

**MASSACHUSETTS AGRICULTURAL
COLLEGE — Continued.**

fund derived from the proceeds of the sale of
public lands as therein provided, requires the
Commonwealth to pay only such rate of inter-
est as it is reasonably able to obtain by the in-
vestment of such fund in safe securities. The
whole amount of such interest, once accrued,
must be paid without diminution to such col-
lege.

**MASSACHUSETTS HIGHWAY COM-
MISSION** — Registration of Auto-
mobiles . . . 579

Under the provisions of St. 1903, c. 473, § 1,
the Massachusetts Highway Commission has
no discretion, if the application is in proper
form, to refuse to register an automobile upon
the ground that it is of improper construction,
or that it is one which should not be allowed to
be operated on the highway.

An automobile the registration of which has
been suspended or revoked may not be regis-
tered again while owned by him by whom it
was owned when such registration was revoked
or suspended, so long as such revocation or sus-
pension remains in force; but upon a bona fide
sale of such machine, and the surrender of the
certificate of registration, the new owner is en-
titled to a new certificate of registration, even
though the period of suspension has not expired.

— Authority over Public Shade Trees —
Tree Wardens . . . 244
See PUBLIC SHADE TREES.

— State Highway — Public Health —
Nuisance . . . 285
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**MASSACHUSETTS HOSPITAL FOR
EPILEPTICS** — Commitment of
Sane Epileptics . . . 103

An epileptic who is not insane cannot be com-
mitted to Massachusetts Hospital for Epileptics.

MASSACHUSETTS REFORMATORY
— Authority of Superintendent to
make Contract, under Specific Re-
solve . . . 35

The authority of the superintendent of the
Massachusetts Reformatory to contract with
the town of Concord to supply the reformatory
with water is limited, under the provisions of
Res. 1894, c. 62, to the execution of a single
contract.

2. — Rules and Regulations . . . 90
The Commissioners of Prisons have no au-
thority to make rules and regulations respecting
the release of prisoners from the Massachusetts
Reformatory.

By St. 1884, c. 255, § 33, the question of
whether a prisoner should be released is left to
the discretion of the Board upon the facts in each
case.

MASSACHUSETTS SCHOOL FUND . 8
See SCHOOL FUND.

MECHANIC ARTS HIGH SCHOOL
OF SPRINGFIELD 98
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MEDFIELD INSANE ASYLUM—
Appropriation 154

The appropriation of \$25,000, under St. 1897, c. 205, for the use of the trustees of the Medfield Insane Asylum in completing the asylum, is not governed by the statutes relating to annual appropriations, providing that, if not expended within two years, such appropriation shall lapse.

A reservation of \$2,000, made by the trustees and not by the Legislature, becomes, when the purposes for which it was reserved are accomplished, available for use in accordance with the original purposes of the appropriation.

MEDICAL ATTENDANCE—Contract
to furnish 226
See INSURANCE. 9.

MEDICAL EXAMINERS—Attorney-
General—Still-born Infants 95

Medical examiners are not entitled to the opinion of the Attorney-General, and therefore are not bound by it.

When a medical examiner receives notice that the dead body of a person, who is supposed to have come to his death by violence, has been found, he should not decline to view it because it is reported to him to be the body of a still-born infant. If upon viewing it he determines that it is a still-born infant, there appears to be no reason why he should hold an autopsy.

2. — Bond—Condition 115
 The bond of a medical examiner must be conditioned upon the "faithful performance of his duties."

MEDICINE, PRACTICE OF—Phys-
icians and Surgeons—Christian
Scientists—Osteopaths, etc. 269

Under a proposed bill relative to the registration of physicians and surgeons, which provides that it shall be a misdemeanor for an unregistered physician or surgeon to practise or attempt to practise medicine, or to hold himself out as a practitioner of medicine, it cannot be held, as a matter of law, that pharmacists, osteopaths, clairvoyants, etc., do not practise or attempt to practise medicine.

MEMBER OF CONGRESS—Resig-
nation—Vacancy—Formal Notice
—Governor 339

After the repeal of St. 1891, c. 396, by St. 1901, c. 511, providing for the election of Representatives in the Fifty-eighth Congress, and in each subsequent Congress until otherwise provided by law, no act remains in force by which the Commonwealth is divided into districts for the choice of Representatives in the Fifty-seventh Congress; and when a vacancy occurs in the representation of any district for such Congress, legislative action is necessary to authorize the election of a successor.

MEMBER OF CONGRESS—Continued.

The Governor can have no official knowledge of the resignation of any Representative in Congress from the Commonwealth, or of any purpose of such member to retire, until formal notice of the resignation has been received by him.

MERCANTILE ESTABLISHMENT—
Employment of Children 616
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METERS—Authority of Metropolitan
Water and Sewerage Board to in-
stall 332
See METROPOLITAN WATER AND
SEWERAGE BOARD. 1.

METROPOLITAN PARK COMMIS-
SION—Erection of Buildings
without Permits 56

The Metropolitan Park Commission may erect buildings on metropolitan park reservations within the limits of the city of Boston without obtaining building permits from the local authorities.

2. — Damages for Removal of Telephone
and Telegraph Poles 82

The Commonwealth is not liable in damages to a telephone and telegraph company for the removal of its poles from land taken by the Metropolitan Park Commission, when the right of the company to maintain such poles is founded upon a mere license given by the person who owned the land before it was taken by the commission.

3. — Powers of Park Police 85

The Metropolitan Park Commission does not have the power to make rules and regulations for the use of portions of the Charles River bordered upon by the lands of the Charles River Reservation.

The general powers of the metropolitan park police are defined by St. 1897, c. 221, § 3.

4. — Police Jurisdiction over Roadways
and Boulevards—Local Police—
Right of Entry 363

The police of any city or town have no authority to enter upon roadways or boulevards exclusively controlled by the Metropolitan Park Commission, for the general purpose of maintaining the public peace and order within the limits of such roadways or boulevards. The right of local officers of police to enter upon such premises is confined to the pursuit and apprehension of persons who have committed a breach of any statute, ordinance or regulation within the limits of an adjacent city or town, and have taken refuge upon a roadway or boulevard controlled by such commission.

5. — Business of Common Victualler—
License from Local Authorities 376

The Metropolitan Park Commission is not authorized to conduct, through employees, a common victualler's business on land taken by

METROPOLITAN PARK COMMISSION—*Continued.*

such commission, without first obtaining a license therefor from the authorities of the city or town within the limits of which such land is situated, nor can a lessee of the Commonwealth conduct such business on land so taken without a license from the local authorities.

6. — Police Jurisdiction — Parks — Local Police — Right of Entry . . . 454

The authority of the Metropolitan Park Commission with regard to police regulation of public openspaces does not differ from that exercised by such commission over parkways and boulevards; and the entrance thereon of local police authorities, as such, must be limited to the pursuit and apprehension of persons who have violated some statute, ordinance or regulation within their jurisdiction, and have sought refuge upon land controlled by such commission.

7. — Appropriation for Boulevards — Expenditure . . . 567

The Board of Metropolitan Park Commissioners may expend money appropriated under the "boulevard act," so called (St. 1894, c. 288), in constructing a roadway or boulevard over and across land already acquired by such Board under the general powers conferred in St. 1893, c. 407, if the purpose of such construction is to connect a road, parkway or other public open space with any part of the cities or towns of the metropolitan parks district under the jurisdiction of the Board.

— Grant of Locations to Boston Elevated Railway Company — Tax — Obligation of Contract . . . 426
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METROPOLITAN PARKS — Violation of Law — Fines . . . 202

The provision of St. 1901, c. 464, requiring that all fines recovered for violation of the laws of the Commonwealth within the limits of lands, roadways or boulevards under the care of the Metropolitan Park Commission shall be accounted for and paid to the Treasurer of the Commonwealth, and by him placed to the credit of such commission, must be limited to fines actually collected or received by the commission.

METROPOLITAN WATER BOARD.
See METROPOLITAN WATER AND SEWERAGE BOARD.

METROPOLITAN WATER AND SEWERAGE BOARD — Authority to install Meters . . . 332

The Metropolitan Water and Sewerage Board is authorized, under St. 1895, c. 488, to install a system of meters for the purpose of securing a more efficient distribution of water to the communities which are supplied by it.

METROPOLITAN WATER AND SEWERAGE BOARD—*Continued.*

2. — Powers and Duties with Reference to Streets — City Ordinances . . . 335

Under the provisions of St. 1895, c. 488, the Metropolitan Water and Sewerage Board has authority to alter the courses or directions of pipe lines which such statute requires it to construct, even if such alterations are in detail at variance with the scheme suggested in outline by the report of the State Board of Health for 1895, therein referred to.

2. A provision in the charter of the city of Newton, that no public street shall be dug up without first obtaining the written approval of the mayor, cannot be construed to impose a restriction upon the Metropolitan Water and Sewerage Board, acting for and in behalf of the Commonwealth in the prosecution of work authorized by St. 1895, c. 488.

3. In laying pipes, the Board must have regard to existing pipes or conduits in the streets, and to any definite existing plan for the future construction of additional pipe lines by the city; but it cannot bind itself to make provision for pipes not now in existence nor a part of any adopted plan.

3. — Construction of Buildings — Permit from Local Authorities . . . 399

The Metropolitan Water and Sewerage Board is not required to obtain a permit from the building department of the city of Boston before proceeding with the erection of a pumping station, and such department cannot require that block stone shall be used in the foundation of such structure.

— Nine-hour Law — Weekly Payments — Preference of Citizens . . . 175
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MILITIA, PROVISIONAL — Commissioned Officer . . . 5

An officer holding a commission in the active militia, who did not enter the service of the United States, in the Spanish war, but accepted an office in the provisional militia, authorized by St. 1898, c. 428, vacated his office in the active militia by accepting the office in the provisional.

2. — Active Militia — Transfer . . . 28

A soldier of the active militia, relieved from duty because he is unable to go into the United States service with his command, does not forfeit his standing in the active militia by enlisting in the provisional militia, and may be ordered by the Commander-in-Chief to rejoin his regular company on its return.

The commander of an organization would not be warranted in discharging such a soldier because he enlisted in the provisional militia.

Men of the provisional militia may be transferred to the active militia by the Commander-in-Chief with or without their application or the consent of the company commanders from and to whom transfer is desired.

MILITIA — Board of Examiners — Commissioned Officer — Examination . 320

The Board of Examiners may accept competent proof of the inability of an officer to appear before such Board for examination within the limit of time required by R. L., c. 16, § 57; and, if such inability was occasioned by ill-health, may postpone the time of examination.

2. — Naval Brigade — Cities and Towns — Duty to furnish Accommodations for Boats and Equipment . 361

R. L., c. 16, § 105, makes it the duty of cities and towns, within the limits of which portions of the volunteer militia are located, to provide suitable accommodations for the equipment necessary to secure the proper efficiency of such militia; and, if an existing armory is not adequate for the storage of boats and other equipment used by a company of the Naval Brigade, a recognized part of the militia of the Commonwealth, quartered within any city or town, proper accommodations must be supplied by such city or town, either within the armory itself or by securing suitable buildings elsewhere.

3. — Governor — Transfer of Company of Militia from One City or Town to Another . 411

The Governor, as Commander-in-Chief of the volunteer militia of the Commonwealth, has no authority to order the transfer of a company of militia from the city or town where such company is lawfully established and located to some other city or town.

4. — Rifle Ranges — Use by United States Troops — Adjutant-General . 439

The Adjutant-General has no authority either to grant or to refuse permission to United States troops to use the rifle ranges furnished under the provisions of R. L., c. 16, § 105, for the use of the volunteer militia, by the several cities and towns.

5. — Armory Commissioners — Erection of Boat House for Use of Naval Reserve . 466

A boat house, for the storage of boats and other equipments used by a company of the naval reserve, located in a city or town, is a part of the armory required to be furnished by such city or town for the use of the volunteer militia quartered therein, and may be erected under the provisions of R. L., c. 16, § 107, authorizing the armory commissioners to acquire land in any city or town within the limits of which two or more companies of militia are located, and to erect an armory thereon for the use of such militia.

6. — Armories — Control — Rules and Regulations — Occupation and Use — Proper Military Purposes . 563

R. L., c. 16, § 116, providing that armories furnished for the militia "shall not be used except by the active militia," or "let to or oc-

MILITIA — Continued.

cupied by any one except for a proper military purpose," includes all armories used by the volunteer militia, whether furnished by cities and towns or constructed by the Commonwealth, under R. L., c. 16, §§ 106-112. Whether or not a particular purpose for which it is desired to use an armory is a proper military purpose, is a question of fact which may probably be determined by the Adjutant-General.

Under the provisions of R. L., c. 16, § 117, which provides that an officer whose command occupies an armory shall have control of the premises during such occupation, "subject to the orders of his superior officers," reasonable rules and regulations governing the occupancy of the building used as an armory and the conduct of members of the militia upon the premises may be issued from military headquarters.

MILITARY ORGANIZATION — Lithuanian St. Kaziner Benefit Society Parade — Side Arms . 333

The Lithuanian St. Kaziner Benefit Society of Haverhill, a corporation organized under the general laws for the purposes of benevolence and charity, is not within the provisions of R. L., c. 16, § 147, and may not, therefore, parade with side arms. In the absence of legislative enactment conferring the right to carry side arms, there is no authority adequate to grant such permission.

R. L., c. 16, § 147 providing that "any organizations heretofore authorized thereto by law may parade with side arms," is not limited to military organizations, but includes any organization which has been so authorized by law.

MILITARY SERVICE — United States Records — Settlement . 227
See PAUPER. 11.

MILLCENT LIBRARY CORPORATION — Investment of Fund . 298

St. 1893, c. 392, providing that the Treasurer of the Commonwealth may receive and hold in trust the sum of \$100,000, for the benefit of the Millicent Library Corporation, for the purposes of a public library in Fairhaven, in section 3 authorizes the Treasurer to purchase long-time securities at a price above par, using so much of the income as is necessary to pay the premium, in order to keep intact the principal of such fund.

MILK — Analysis of Milk Samples — Dairy Bureau . 50
See ANALYSIS.

MILK JARS . 297
See SEALER OF WEIGHTS AND MEASURES.

MINORITY — Rights in Consolidation of Co-operative Savings Banks . 484
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Land at a distance of 200 feet below low-water	
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Sts., c. 1, § 7, although structures of loose stones	
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NET INDEBTEDNESS—Counties,	
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NEW ENGLAND COTTON YARN	
COMPANY—Capital Stock—	
Stock Watering—Commissioner	
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The enactment of the bill to incorporate the	
New England Cotton Yarn Company, a private	
corporation, would afford no greater opportu-	
nity for the practice of "stock watering" than	
is given to such corporations in the general	
laws of this Commonwealth.	
Corporations formed for the carrying on of	
private business, except for the requirement	
that they begin such business upon a fully paid	
capital, are left free, under the general laws,	
from any supervision over the investment of	
their capital stock.	
Stock watering is the issuance of capital	
stock that does not represent full value paid in,	
either in cash or in property. Since the Com-	
missioner of Corporations has the final decision	

NEW ENGLAND COTTON YARN COMPANY—Continued.

upon the value of property taken in exchange for shares (Pub. Sts., c. 106, § 48), the issuance of watered stock depends upon the ability of the commissioner to determine accurately the value of such property.

NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY

—Consolidated Corporation—Control—Legislature—Forfeiture of Charter—Attorney-General—Acquisition of Stock in Massachusetts Street Railway Corporations—Control of Domestic Street Railway Corporations by Foreign Corporation 570

The Attorney-General cannot be required to determine the difference between the "rights, privileges and duties of the Boston & Maine Railroad Company and the New York, New Haven & Hartford Railroad Company in the matter of the purchase of the stock or bonds of street railway corporations," since such determination would involve a consideration of conditions arising beyond the jurisdiction of the laws of the Commonwealth.

The Legislature of the Commonwealth must be assumed to have conceded by implication the right to the consolidated corporation, the New York, New Haven & Hartford Railroad Company, to exercise such powers as the State of Connecticut, acting upon matters within its exclusive jurisdiction, could grant to it, and to reserve to itself the right to exercise exclusive control over the corporation only as to such matters as should be within its exclusive jurisdiction.

Under R. L., c. 111, § 77, the acquisition by the New York, New Haven & Hartford Railroad Company of all or part of the stock of a Massachusetts street railway corporation is illegal; and the Attorney-General, by appropriate process, may invoke the action of the courts either to nullify or restrain such transaction, or to effect the forfeiture of the charter of such corporation in so far as the same exists by grant of this Commonwealth.

Any action upon the part of the New York, New Haven & Hartford Railroad Company in the State of Connecticut for the purpose of acquiring control of a Massachusetts street railway corporation, although such action was authorized by the laws of Connecticut, would render the charter and franchises of such company, in so far as they existed by grant of the Legislature of Massachusetts, liable to forfeiture.

The ownership or control by the Consolidated Railway Company of Connecticut, a foreign corporation, of a majority of the capital stock of one or more Massachusetts street railway companies, is such ownership and control as is intended by R. L., c. 126, § 11, providing that where a majority of the capital stock of a domestic street railway, gas light or electric light corporation is owned or controlled by a foreign corporation, which makes such owner-

NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY
— *Continued.*

ship or control the basis of a security for an issue of stock, bonds or other evidence of indebtedness, the Supreme Judicial Court shall have jurisdiction to dissolve the charter of such domestic corporation.

NEWBURYPORT BRIDGE — Legal
Title — Repair and Maintenance . 276

The title to the bridge over the Merrimack River, between the city of Newburyport and the town of Salisbury, was vested, under the terms of St. 1867, c. 296, § 7, in the county of Essex, by virtue of the proclamation by the Governor, dated Aug. 22, 1868, declaring the bridge to be free.

Since the bridge has become a public highway, however, questions relating to its repair and maintenance, and the parties who shall contribute thereto, are wholly within the discretion of the Legislature, and are to be determined upon considerations in no way connected with the legal ownership of the property.

NINE-HOUR LAW . . . 175
See LABOR. 1.

NOLO CONTENDERE — Violation of
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NOMINATION OF CANDIDATES —
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— Under Australian Ballot Law — Illegal
Nominations — Certiorari — Attorney-General — Quo Warranto . 642
See AUSTRALIAN BALLOT LAW. 5.

NORTHERN AVENUE BRIDGE . 5
The right of the Commonwealth, under the four-part agreement to build Northern Avenue bridge and to extend Northern Avenue, is not impaired by St. 1880, c. 260, or by the deed made under authority of that statute.

NOTICE — Of Transfer of Insane Paupers
to State Almshouse . . . 228
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— Aid furnished by Cities and Towns to
State Paupers . . . 304
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— Resignation of Member of Congress
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— Posting on Shade Trees on State
Highway . . . 385
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— Appointment of Referees under Stand-
ard Fire Insurance Policy — Mort-
gaged Policy — Insurance Commis-
sioner . . . 582
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NUISANCE — State Highway — Massa-
chusetts Highway Commission . 285
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— Fees — Service of Warrants . . 20
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— Duty of District Police Officer in Ex-
tradition Cases to notify Fugitive
of Right to apply for Writ of Ha-
beas Corpus — Expenses . . 380
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OFFICIAL BALLOT — Nomination of
Candidates — Secretary of the
Commonwealth . . . 225
See AUSTRALIAN BALLOT LAW. 1.

OLEOMARGARINE — Label on Pack-
age . . . 332
R. L., c. 56, §§ 36, 43, relating to marks on
wrappers in cases of the sale of oleomargarine
or renovated butter, is sufficiently complied
with if the individual packages containing such
merchandise are plainly marked by labels set-
ting forth the contents; and where several
packages, one of which contains oleomarga-
rine, and is so marked, are enclosed in a com-
mon wrapper, it is unnecessary that such wrap-
per should also be labelled.

ORIGINAL PACKAGE — Importation
and Sale of Intoxicating Liquors . 436
See INTOXICATING LIQUORS. 1.

OSTEOPATHISTS . . . 269
See MEDICINE, PRACTICE OF.

OYSTERS — Planting and Cultivation of
— Licenses — Flats — Boundaries . 431

Under R. L., c. 91, §§ 104, 105, the authority of the mayor and board of aldermen in cities, and of the selectmen in towns, to grant licenses for the planting and cultivation of oysters upon flats between high and low water mark, is limited to licenses for the placing of shells upon such flats, upon the written consent of the owner thereof; and all other operations connected with the cultivation or digging of oysters must be carried on below mean low-water mark.

R. L., c. 91, § 105, does not require that the licenses granted thereunder shall specify the shore line in feet, if reference may be otherwise made to metes and bounds which are readily ascertainable.

PARADE—Right of Military Organizations to, with Side Arms . . . 333
See **MILITARY ORGANIZATION**.

PARIS EXPOSITION . . . 60
See **BOARD OF PARIS EXPOSITION MANAGERS**.

PARKS—Jurisdiction of Metropolitan Park Commission—Right of Local Police to enter . . . 454
See **METROPOLITAN PARK COMMISSION**. 6.

PAROLE LAW—Convict—Successive Sentences . . . 189

A convict who has received successive sentences, imposed either prior to the expiration of, or previous to his commitment upon, his first sentence, is not entitled to the provisions of St. 1894, c. 440.

PAUPER—Dead Body—Promotion of Anatomical Science . . . 1

By St. 1898, c. 479, an act relative to the promotion of anatomical science, the officials named therein must surrender to medical schools, upon proper application and the giving of a bond as prescribed, such bodies as would otherwise be buried at the public expense.

After such application, the officials cannot bury the body at the public expense.

The terms of the bond, as required by the statute, prohibit the return of such bodies.

2. — Married Woman—Settlement . . . 3

A woman who acquired a settlement by marriage in one town could not acquire one on her own account, under St. 1879, c. 242, § 2, in another, so that she could become a charge upon the second town, after her husband's settlement and her own, acquired by marriage, in the first town, were destroyed by St. 1898, c. 425, § 2.

3. — Settlement—Married Woman—Domicile . . . 15

A woman whose husband has never had a domicile in this Commonwealth, and who has deserted her, may by her own separate residence acquire a settlement here.

The doctrine that a married woman's domicile is that of her husband has no application to this case.

That doctrine does not apply so as to give a woman who came to this Commonwealth from a foreign country three years after her husband a constructive residence here, during the three years, which can be tacked on to her actual residence here, for the purpose of giving her a settlement.

4. — Unmarried Woman—Settlement—Residence . . . 17

The retroactive provision of St. 1874, c. 274, which gives a settlement to a woman by reason of residence, though such residence accrued before its enactment, does not apply to the case of an unmarried woman who at the time of its enactment was not a resident of Massachusetts.

PAUPER—Continued.

5. — Temporary Aid to Unsettled Poor . . . 19

St. 1898, c. 425, § 5, does not apply to persons whom the overseers of the poor are maintaining in their local almshouses, whose settlements are defeated by other sections of that act.

6. — Derivative Settlement . . . 24

A person who derived a settlement in Boston from his father, which prevented him from gaining a settlement there in his own right under St. 1874, c. 274, is within the exception of St. 1898, c. 425, and his derivative settlement stands.

7. — Settlement—Married Woman—Derivative Settlement of Son . . . 80

A woman whose husband died in January, 1874, without ever having gained a settlement in Massachusetts lived in Boston from that time until her death, in 1889. She therefore gained a settlement in her own right, in January, 1879, which was not affected by the retroactive provisions of St. 1879, c. 242. Her son became of age before she gained a settlement, and therefore did not derive one from her, and, since he has never gained one in his own right, he is an unsettled person.

8. — Insane—Jurisdiction of Board of Insanity when they are committed subject to Orders of Court . . . 92

St. 1898, c. 433, § 11, does not confer upon the State Board of Insanity authority to send to other States, or even to any place within this Commonwealth, paupers committed to a lunatic hospital, who are nevertheless subject to the orders of the court.

9. — Married Woman—Domicile—Settlement, derived by Marriage . . . 158

In Pub. Sts., c. 83, § 1, cl. 7, which provides that only such married women as have not a settlement "derived by marriage" may gain a settlement by residence, the words "derived by marriage" signify an existing marriage.

Therefore, a married woman settled under a previous marriage, which has been terminated by the death of the husband, is not prevented from acquiring a new settlement by residence. Where a wife, deserted by her husband, remains for a period of more than twenty years where their joint domicile had been, she will not be debarred from gaining a settlement by the fact that he has had no settled place of residence since the time of such desertion.

10. — Settlement—Repeal of Statute—Effect on Liability of City or Town 180

A settlement gained under Gen. Sts., c. 69, § 1, cl. 5, and completed before the enactment of the repealing statute, which expressly saves "all acts done or rights accruing" before the repeal takes effect, is not lost or affected by such repeal.

If by reason of a settlement a city or town has become liable for the support of a pauper, such liability is not taken away, nor is the right of another city or town, or of the Common-

PAUPER — Continued.

wealth, to enforce such liability, destroyed, because of the repeal of the statute under which the settlement was gained, if such repeal is not retroactive.

11. — Settlement — Military Service — United States Records . . . 227

Where a pauper is enrolled upon the records of the United States as having been honorably discharged from the military service thereof, that fact is conclusive evidence of such discharge upon a question of settlement.

12. — Insane Person — Transfer to State Almshouse — Notice . . . 228

Where an insane person, who has been duly committed to and is a legal inmate of an insane hospital, is transferred by the State Board of Charity, by authority of St. 1888, c. 69, to the insane ward of the State Almshouse, notice of such transfer to the town liable for his support is not required.

Nor is the father of such person pauperized by his detention in the State Almshouse, his status being that of an insane person, and not that of a pauper.

13. — Settlement — Effect of Retroactive Statute . . . 274

A settlement acquired prior to 1860, which by its existence prevented the acquisition of a settlement in the same place, comes within the exception contained in St. 1898, c. 425, § 2, and is not lost because the person acquiring such settlement died before the passage of the statute.

14. — Unsettled Woman — Retroactive Statute . . . 291

A female pauper, who, prior to 1860, acquired a derivative settlement through her husband, was not an "unsettled woman" within the retroactive provisions of St. 1874, c. 274, § 2, and St. 1878, c. 190, and so could not acquire a settlement thereunder in her own right, and therefore became, upon the passage of St. 1898, c. 425, § 2, cutting off her derivative settlement, an unsettled woman.

15. — State Paupers — Aid furnished by Cities and Towns — Rendering of Bill — Notice . . . 304

The rendering to the Commonwealth of a bill for aid furnished by a city or town to a State pauper, as required by Pub. Sts., c. 86, § 43, does not terminate the liability of the Commonwealth to make reimbursement therefor, so as to require a new notice from such city or town if the aid is thereafter continued.

16. — Settlement . . . 319

A widow owning and occupying an estate of inheritance or freehold for three consecutive years, may thereby acquire a settlement, in accordance with the provisions of R. L., c. 80, § 1, cl. 4.

Under the provisions of R. L., c. 80, § 1, cl. 5, not only the assessment of the taxes specified

PAUPER — Continued.

therein, but also the payment thereof, must be made within a period of five consecutive years.

17. — Military Settlement — Desertion . . . 390

A person is not debarred from gaining a settlement under the provisions of R. L., c. 80, § 1, cl. 10, by reason of the fact that he absented himself from his command, and was thereafter found serving with other troops and was returned to his original regiment, where he remained until honorably discharged from the service of the United States, there being no evidence that such person was ever proved guilty of desertion.

18. — Settled Pauper — Liability for Support . . . 447

Where a pauper inmate of a State institution has a settlement in any city or town in this Commonwealth, such city or town is liable to the Commonwealth for his support, notwithstanding the fact that there may be kindred or other persons who are bound by law and are of sufficient ability to defray the expense incurred therefor.

19. — Disease Dangerous to Public Health — Removal to State Hospital — Expenses of Transportation . . . 499

The State Board of Charity is authorized, by R. L., c. 85, § 14, to direct the local authorities to remove to the State Hospital a State pauper found within the limits of their jurisdiction who is afflicted with the disease of leprosy; and in case such removal is ordered, the expense of transportation must in the first instance be borne by the town, which is entitled to subsequent reimbursement from the Commonwealth "for the excess over thirty miles by the usual route, at a rate not exceeding three cents a mile," in accordance with the provisions of R. L., c. 85, § 9.

PERMIT — For Erection of Buildings . . . 56
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PHARMACY, BOARD OF REGISTRATION IN — Revocation of Certificate — Mistake of Fact . . . 165
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— Sixth-class License — Clerk in Pharmacy . . . 283
See REGISTERED PHARMACIST. 3.

PHARMACY LAW — Plea of Nolo Contendere — Conviction . . . 276

A plea of nolo contendere, followed by a fine imposed by the court, is a conviction within the meaning of St. 1896, c. 397, § 9.

PHYSICIANS AND SURGEONS — Christian Scientists — Osteopaths, etc. . . . 269
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PILOTS OF BOSTON HARBOR—Order prescribing—Specific Channel . 446
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PILOTS, COMMISSIONERS OF—
Regulation to combine Pilot Boats and Pilotage Fees . 47
The regulations for the pilotage of Boston harbor, annexed to St. 1862, c. 176, and expressly continued in force by Pub. Sts., c. 70, § 40, forbid the commissioners of pilots to combine the pilot boats and earnings, so that all the Boston pilots will receive the same amount.

2. — **Pilots of Boston Harbor**—Order prescribing Specific Channel . 446
Under the provisions of R. L., c. 67, § 2, and in the absence of regulations to that effect imposed by the Congress of the United States, the pilot commissioners have no authority to require that, when in charge of heavy vessels, pilots shall enter and leave the port of Boston by a specific channel.

PITTSFIELD—Authority of the State Board of Health to extend Time for Discharge of Sewage into Housatonic River . 46
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PRIVATE EDUCATIONAL INSTITUTIONS—Registers for School Statistics . 88
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PROXY—Voting by—Directors of Co-operative Savings Banks . 275
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PUBLIC BOXING MATCHES . 248
St. 1896, c. 422, provides penalties against two classes of offenders: first, those who engage in public boxing matches of all kinds; and second, those who engage in professional boxing in public or private.

PUBLIC DOCUMENTS—Annual Returns of Insurance Companies . 381
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PUBLIC LIBRARY—Support . 316
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PUBLIC NUISANCE—Advertising near Public Parks or Boulevards . 326
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— **Gypsy and Brown-tail Moths**—Suppression and Destruction—Cities and Towns—Local Boards of Health—Local Officers—Compulsory Suppression . 589
See **GYPSEY AND BROWN-TAIL MOTHS**. 1.

PUBLIC OFFICERS—Acts of De Facto Official—City Council—Organization—Ratification of Irregularities—Quo Warranto—Attorney-General . . . 635

The Attorney-General has authority to file an information where the application for the filing of such information alleges that the respondent was unlawfully appointed to a public office, and holds it in violation of law.

It is not necessary that the Attorney-General should be satisfied that the information which he is called upon to sign can be maintained, if the questions raised by it are doubtful, and the matter is one of public importance which cannot otherwise be determined.

When at a first meeting of the members-elect of the common council of the city of Boston the senior member took the chair, and, after calling the council to order, entertained and declared carried a motion to adjourn, and immediately left the chair, refusing to entertain a doubt of the vote, expressed by one of the members, the rights of the members-elect were not concluded by such adjournment, and they might select some other person to take the chair, and proceed with the organization of the council.

When a presiding officer of the common council is elected under proceedings of doubtful validity, the records of which, duly made and signed by the clerk, are approved at a subsequent meeting, such approval is a ratification of whatever irregularities existed in the original election, notwithstanding the fact that such record was not read, and that the clerk was a de facto official, holding over from the previous year.

The acts of a de facto clerk have all the force of those of a clerk de jure until they are directly impeached by a proceeding brought to test the legality of his office.

— Quo Warranto—Attorney-General . 632
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— Election Officers—Misconduct—Election—Precinct—Quo Warranto—Attorney-General . . . 649
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PUBLIC PARKS OR BOULEVARDS.
— Regulations of Advertisements near—Police Power . . . 326
See CONSTITUTIONAL LAW. 5.

PUBLIC RECORDS . . . 48
The duty imposed upon selectmen by St. 1897, c. 439, § 10, to provide fireproof vaults for the public records of the town, is not conditioned upon action or appropriation by the town; and such officers may incur the expense of compliance with the law, and the city or town is obliged to reimburse them.

2. — Commissioner of—Ink furnished to Cities, Towns and Counties . . . 89
St. 1899, c. 354, requiring public records of cities, towns, counties and the Commonwealth

PUBLIC RECORDS—Continued.
to be kept in ink "furnished by the commissioner of public records," does not require the commissioner to furnish ink to cities, towns and counties free of expense.

PUBLIC RIGHTS—In Great Ponds—Approval of Structures in—Sources of Water Supply . . . 232
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— In Great Ponds—Used as Source of Water Supply—Fishing . . . 239
See GREAT PONDS. 3.

PUBLIC SCHOOL—Sectarian Institution . . . 100
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PUBLIC SHADE TREES—Tree Wardens—Massachusetts Highway Commission . . . 244
Tree wardens, elected in accordance with St. 1899, c. 330, may not interfere with or overrule the authority of the Massachusetts Highway Commission, but, subject to such authority, their duty of police jurisdiction over shade trees in State highways is the same as that with relation to other public shade trees in towns.

— State Highway—Posting of Notices . 385
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PUBLIC WORKS—Rate of Wages—Cities and Towns . . . 264
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— Hours of Labor on—Constitutional Law . . . 497
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PUBLICATION—Rules and Regulations for Protection of Water Supply—Expense . . . 357
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— Orders or Regulations of Chief of Cattle Bureau—Approval . . . 425
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QUO WARRANTO—Information in Equity—Right to take Fish from the Sea—Penal Statute—Attorney-General . . . 631
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— Public Officer—Police Commissioner of Boston—Attorney-General . 632
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— City Council—Organization—Ratification of Irregularities Acts of De Facto Official—Attorney-General 635
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— Of Probate and Insolvency . . . 86
See INTERNAL REVENUE LAW.

REGISTERED PHARMACIST—Revocation of Certificate—Re-examination . . . 97

The Board of Registration in Pharmacy is not required to examine an applicant for a certificate as a pharmacist, if it has revoked a license formerly issued to him.

2. — Mistake of Fact—Revocation of Certificate—New Examination . . . 165

The Board of Registration in Pharmacy may, in its discretion, grant a new examination to a person whose certificate of registration as a pharmacist has been duly revoked by the Board.

Where the Board has regularly revoked a license, it has no authority to reconsider such decree and to grant a new license without a new examination.

The Board may, however, reconsider a revocation decreed through mistake of fact.

3. — Sixth-class License—Clerk—Board of Registration in Pharmacy . . . 282

The granting of a sixth-class license to a registered pharmacist who is acting as a clerk in a

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pharmacy does not constitute a violation of the pharmacy law, requiring the Board of Registration in Pharmacy to investigate and notify the proper prosecuting officer, as provided in St. 1896, c. 397, § 21.

4. — Examination—Inability of Candidate to understand English Language . . . 318

A person who presents himself as a candidate for examination for registration as a pharmacist is not necessarily debarred therefrom because he is unable to speak, read or write the English language.

5. — Suspension of License or Certificate of Registration—Conviction . . . 482

The Board of Registration in Pharmacy, under R. L., c. 76, § 17, which provides in part that "the license or certificate of registration of a registered pharmacist shall not be suspended for a cause punishable by law until after his conviction by a court of competent jurisdiction," may suspend the certificate of registration or license of a registered pharmacist who has been duly found guilty of the illegal sale of intoxicating liquors and sentenced to pay a fine therefor, and who has paid such fine, notwithstanding the fact that exceptions thereto have been filed and allowed, and are still pending for argument before the Supreme Judicial Court.

6. — Copartnership License—Intoxicating Liquors—Alcohol—Transportation . . . 621

R. L., c. 100, § 22, providing that "a registered pharmacist who owns stock of the actual value of at least five hundred dollars in a corporation which has been incorporated for the purpose of carrying on the drug business, and who conducts in person the business of a store of such corporation, shall be considered as actively engaged in business on his own account, and as qualified to receive a license for such store," is not applicable to a copartnership.

R. L., c. 100, §§ 49, 50, regulating the transportation of "spirituous or intoxicating liquor," extend to and include alcohol.

REGISTRAR OF VOTERS—Member of Political Party—Caucus . . . 644
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— Foreign Insurance Company 123
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— Not Insurance 157
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— By Foreign Fire Insurance Company
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REPEAL OF STATUTE—Effect of, on Settlement acquired under Repealed Statute 180
See PAUPER. 10.

RESERVE—Lien on Policy—Asset 251
See INSURANCE. 10.

RESERVE FUND—Fraternal Beneficiary Corporation 212
See INSURANCE. 7.

RESIDENCE—Enlistment 160
 A person is, in general, a resident of Massachusetts who lives in the Commonwealth with the intention of having his home there. A person so residing in Massachusetts, who was mustered into the regular army, whether naturalized or not, comes within the provisions of St. 1898, c. 561, § 1.

2. — Enlistment—Evidence of Intention 170
 A person actually living in a city within the Commonwealth, who has filed his primary declaration of intention to become a citizen of the United States, describing himself as a resident of such city, and who enlists therefrom, is prima facie a resident of this Commonwealth, and is entitled to the benefits of St. 1899, c. 561.
 The length of such residence is not material under the statute, except so far as it is confirmatory evidence of the intention of the party.

— Settlement—Unmarried Woman 17
See PAUPER. 4.

RESIDENT—Unnaturalized Alien 301
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RESIGNATION—Member of Congress
 — Vacancy—Notice to Governor 339
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— Gas and Electric Light Commissioners
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RIDERS—Standard Policy—Fire Insurance—Modifications 545
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RIFLE RANGES—Use by United States Troops—Adjutant-General 439
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RULES AND REGULATIONS—For use of Charles River 85
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— Release of Prisoners—Massachusetts Reformatory 90
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— For Protection of Water Supply—Publication—Expense—State Board of Health 357
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— Of State Board of Health—Effect on Stocking of Great Ponds used as Sources of Water Supply with Food Fish—Commissioners on Fisheries and Game 553
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— Use and Control of Armories—Proper Military Purposes 563
See MILITIA. 6.

— For the Suppression and Destruction of Gypsy and Brown-tail Moths—Infested Cord Wood 617
See GYPSY AND BROWN-TAIL MOTHS. 3.

SALARY—Retired Justice of Supreme Court 52

It was not the intention of the Legislature to terminate, by St. 1899, c. 310, the salary of a retired justice of the Supreme Court, to which he was entitled by St. 1885, c. 162. The act of 1899 is to be taken as a continuance, and not as a repeal, of the older statute.

Such salary shall be certified as payable under the provisions of the statute of 1899.

— Employee of Commonwealth—Additional Compensation 309
See EMPLOYEE OF COMMONWEALTH.

SAVINGS BANKS—First Mortgage of Real Estate—Property leased for Ninety-nine Years . . . 23

A lessee of land for ninety-nine years, who erects a building thereon, cannot give such a mortgage on the building, or the land, or both, as savings banks must take, under a statute allowing them to invest their deposits in first mortgages of real estate in this Commonwealth.

2. — Authorized Investments—Bonds of Chicago, Burlington & Quincy Railroad Company . . . 43

In determining whether the bonds of the Chicago, Burlington & Quincy Railroad Company are investments which savings banks are authorized to take by St. 1899, c. 269, payments to sinking funds and interest upon sinking funds are to be considered as earnings of the company.

3. — Authorized Investments—Net Indebtedness . . . 115

The net indebtedness of a county is not defined in St. 1894, c. 317, § 21, par. 2, cl. 1, but, in accordance with the ordinary construction of the term, in computing the net indebtedness of a county, sinking funds available for the payment of such indebtedness are to be deducted.

4. — Authorized Investments—Guaranty . . . 257

An agreement to purchase first mortgage bonds for their face value at the time and place of the maturity of such bonds is not equivalent to a guaranty, as required by St. 1894, c. 317, § 21.

5. — Investments—Bonds of Town of Danbury, Conn.—Valuation . . . 323

In determining whether or not bonds issued by the town of Danbury, Conn., may be a legal investment for Massachusetts savings banks, under the provisions of R. L., c. 113, § 26, which permits investments to be made in the bonds of any town in Connecticut whose net indebtedness does not exceed three per cent. of the last preceding valuation of the property therein for the assessment of taxes, the Board of Commissioners of Savings Banks must be guided by the valuation of the town assessors, and not by that of the State Board of Equalization of Connecticut, whose function under the laws of that State is simply to adjust the valuations among the several towns, so that the burden of the State tax may bear equally upon them.

6. — Investments—First Mortgage of Real Estate . . . 593

A transaction by which a person borrows money of a savings bank upon his personal note, pledging as collateral therefor certain mortgage notes secured by real estate within the Commonwealth, and assigned to such bank and duly recorded, the mortgagee still continuing to receive the interest upon the mortgage notes, is not an investment in first mortgages of real estate within the meaning of R. L., c. 113, § 26, cl. 1, permitting savings banks to invest deposits and income in "first mortgages of real estate situated in this Commonwealth."

SAVINGS BANKS—Continued.

7. — Legal Investments—Bonds of the Bangor & Aroostook Railroad Company . . . 619

Consolidated refunding mortgage bonds of the Bangor & Aroostook Railroad Company, issued under a general refunding mortgage, which was a first mortgage as to a part of the road of such company, but was subject to prior outstanding mortgages as to the remainder, are not first mortgage bonds within the meaning of R. L., c. 113, § 26, par. third, cl. a, authorizing savings banks to invest "in the first mortgage bonds of a railroad company incorporated in any of the New England states," under the conditions therein set forth; and such bonds are not a legal investment for savings banks in this Commonwealth.

SCHOOLS—Superintendent—Tenure of Office . . . 68

The term of office of a superintendent of schools does not expire at the end of the year for which he was appointed, when the school committee fail to appoint a successor; and he is entitled to hold office until his successor is appointed.

2. — Union of Towns to employ Superintendent—Article in Town Warrant . . . 78

An article in the warrant of a town, "to see if the town will vote to form a union with" another town "for the purpose of employing a superintendent of schools," is sufficient to authorize the voters of that town to vote for such union, although St. 1898, c. 466, is not referred to in the article, especially as there is no other statute under which a union of towns for that purpose could be affected.

— Private School—Approval of State Board of Education—Tuition—Westford Academy . . . 75
See EDUCATION, STATE BOARD OF. 2.

— Payment by Town of Tuition at Manual Training School—Mechanic Arts High School of Springfield . . . 98
See HIGH SCHOOL. 1.

— Public School—Sectarian Institution—Constitutional Law . . . 100
See CONSTITUTIONAL LAW. 2.

SCHOOL DISTRICT—Joint Committee of School Committees—Certification of Salary of Superintendent of Schools . . . 468

In a school district organized under the provisions of R. L., c. 42, § 43, the joint committee of school committees of the several towns forming such district, which is thereby authorized to act as agent of such towns, may certify to the several town treasurers the proper proportions of the salary of the superintendent of schools, without securing the approval of any other local board or authority.

SCHOOL FUND—Payment for Benefit of Teachers . . . 240

It was not the intention of the Legislature that the payment for the benefit of teachers, provided for in St. 1896, c. 408, should be deducted from the half of the school fund set apart by St. 1891, c. 177, for the support of the public schools.

The amount required to carry out the purposes of the statute of 1896 is clearly included within the class of expenditures for "other educational purposes," to which the other half of such fund is appropriated.

SEALER OF WEIGHTS AND MEASURES—Public Weighing—Platform Weighing Machine—Milk Jars . . . 297

A platform weighing machine, publicly placed for the purpose of allowing a person to ascertain his weight upon the payment of a fee, is not used for the purposes of commercial transactions, and is not within the provisions of Pub. Sts., c. 65, requiring weights, measures or balances for the purpose of selling goods, wares, merchandise or other commodities, or for public weighing, to be adjusted and sealed.

A sealer of weights and measures of a city or town has no authority to seal a milk bottle of a size not prescribed by St. 1901, c. 360.

SECRETARY OF THE COMMONWEALTH—Convention—Official Ballot—Nomination of Candidates . . . 225
*See AUSTRALIAN BALLOT LAW. 1.***—Filing and Recording of Trade Marks—Identical Trade Marks . . . 303**
*See TRADE MARK.***—Australian Ballot Law—Filing Call for Caucus—Precedence of Two Political Parties . . . 605**
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*See TAXATION. 4.***SECURITY—For Loan to Co-operative Savings Bank—Second Mortgage . . . 462**
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*See PAROLE LAW.***SETTLEMENT.**
*See PAUPER.***SEWAGE—Of Pittsfield, Discharge of—Authority of State Board of Health to extend Time for . . . 46**
*See STATE BOARD OF HEALTH. 1.***SHELLFISH—Cultivation—City and Town Authorities—Close Season—Private Rights . . . 577**

The clause "*provided*, that no private rights are impaired," in St. 1904, c. 282, § 1, providing that under certain conditions therein set forth "the mayor and aldermen of cities, and the selectmen of towns, when so authorized by their respective cities and towns, may declare from time to time a close season for shellfish . . . in such waters or flats within the limits of their respective cities and towns as they deem proper, and may plant and grow shellfish in such waters and flats: *provided*, that no private rights are impaired . . ." has reference to right of the littoral proprietor to exclude navigation by the erection of wharves or other structures extending to the limit of private ownership; the right to interfere with public use by setting stakes or by keeping back the water by means of a dyke; and the right to fill such flats if duly licensed by the Board of Harbor and Land Commissioners, together with the permission in the nature of a right when granted, and not incidental to riparian ownership, to engage in the cultivation of shellfish as authorized by R. L., c. 91, §§ 104, 105.

SHERIFF—Supplies for Private Use—Expense—County . . . 612
*See COUNTY.***SIDE ARMS—Right of Military Organization to parade with . . . 333**
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The war was not ended by the ratification of the treaty of peace by the Senate of the United States.**SPECIAL COMMITTEE—Expenses—Expert Advice . . . 457**
*See APPROPRIATION.***STANDARD POLICY—Of Insurance—Foreign Fire Insurance Company . . . 471**
*See INSURANCE. 17.***—Fire Insurance—Modification—Binding Slips—Riders . . . 545**
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STANDARD POLICY—Continued.

- Fire Insurance—Appointment of Referees—Mortgaged Policy—Notice 582
- See INSURANCE. 22.

- STATE ALMSHOUSE—**Transfer of Insane Paupers to 228
- See PAUPER. 12.

STATE BOARD OF AGRICULTURE

- Shade Trees, Designation of Public—Tree Wardens 191
- St. 1899, c. 330, a codification of the laws relative to the preservation of shade trees, which makes it obligatory upon towns to elect a tree warden, supersedes the authority over such trees conferred by earlier statutes upon selectmen or other town officers.
- Since chapter 330 defines public shade trees as "all shade trees within the limits of any public way," it has the effect to relieve the Board of Agriculture from the obligation, imposed by St. 1890, c. 196, to supply M spikes to towns for the purpose of designating such shade trees as are to be considered public shade trees.

- Agent to Investigate Gypsy Moth outside Commonwealth 118
- See GYPSY MOTHS.

STATE BOARD OF HEALTH—Authority to extend Time originally fixed for Discharge of Sewage of Pittsfield into Housatonic River 46

The State Board of Health did not exhaust its authority under St. 1890, c. 357, § 1, by approving a general plan for the construction of a system of sewerage for the city of Pittsfield, and may entertain a petition by the city for an extension of the time originally fixed for the discharge of sewage into the Housatonic River.

- 2. — Rules and Regulations for Protection of Water Supply—Publication—Expenses 357

Under the provisions of R. L., c. 75, § 113, authorizing the State Board of Health to make rules and regulations to secure the sanitary protection of waters used as sources of water supply, it is the duty of such Board to cause the publication of such rules and regulations, and to meet all expenses incidental to such publication.

STATE BOARD OF PUBLICATION—

- Documents—Approval of Official Publication 398

The word "documents," as used in St. 1902, c. 438, § 2, extends to and includes a compilation by a State officer of laws relating to the department under his charge, and also a publication by a State Board, containing certain information useful in the schools of the Commonwealth; and such publications must be approved by the State Board of Publication.

- 2. — Approval of Publication of Statistics 534
- Statistics, or figures, specifically required by law to be set forth and published in the reports

STATE BOARD OF PUBLICATION—

Continued.
of officers or heads of departments of the Commonwealth, are not subject to the jurisdiction of the State Board of Publication, as defined by St. 1904, c. 388, § 2, which provides that boards, commissions and heads of departments shall not incorporate any statistics into the documents relating to their several departments without first securing the approval of such Board.

STATE CONTRACTS—Regulations regarding Award—Preference of Home Industries 243

With the exception of Pub. Sts., c. 221, §§ 54-58, there are no laws, rules or regulations in regard to the awarding of State contracts.

There is no law containing any provision for the preference of home industry, in case some manufacturer of another State of the Union, or a foreign firm, offers the lowest bid.

STATE HIGHWAY—Expense of Repairing when occupied by Street Railway Tracks 49

St. 1898, c. 578, relieves street railway companies from the duty formerly imposed upon them of keeping in repair a portion of the streets in which their tracks are located, and the Commonwealth must bear all the expense of repairing State highways occupied by street railway tracks, although the towns in which highways are receive the tax in which the statute of 1898 imposes upon the street railway companies in substitution for the duty of keeping in repair a portion of the streets occupied by their tracks.

2. — Street Railway, Alteration of Location—Expense 105

St. 1898, c. 578, §§ 16, 24, confer upon the Massachusetts Highway Commission authority to alter a location granted by the local authorities to a street railway company, before the street was taken as a State highway, and to assess the expense thereof upon the railway company, or upon the Commonwealth, or upon both. An assessment upon the Commonwealth must be paid out of the appropriation for the commission.

No part of such expense can be assessed upon abutters.

Jurisdiction to alter a location granted after the street was taken for a State highway remains in the local authorities.

3. — Lay-out—Discontinuance—Filing of Plans—Errors 177

The Massachusetts Highway Commission, after a State highway has been laid out and the required plans and certificates have been filed in the offices of the town and county clerks, have no authority to discontinue such highway or any part of it.

In general, however, mere clerical errors may at any time be corrected.

4. — Alterations—Street Railway—Apportionment of Cost 179

The Massachusetts Highway Commission

STATE HIGHWAY—Continued.

cannot, under St. 1898, c. 578, § 16, make any apportionment of the cost of changes in location or alterations of street railway tracks ordered by the commission before the passage of that statute.

5. — Street Railway—Alteration of Location—Requirement of Paving . 182

The Massachusetts Highway Commission has no authority to require of a street railway, upon a relocation of its tracks ordered by the commission, that "the space between the rails, and eighteen inches on the outside of each rail, shall be paved with block paving."

6. — Cost of Maintenance—Impairment of Contract—Constitutional Law 195

The provision of St. 1893, c. 476, that the maintenance of State highways shall be paid for by the Commonwealth, and not by the towns through which the ways are located, does not constitute a contract to that effect between the Commonwealth and such towns, and it is competent for a succeeding Legislature to change the burden of maintaining such highways in such manner as it sees fit.

7. — Alteration of Tracks of Street Railway—Changes of Grade—Apportionment of Cost . . . 236

The State Highway Commission, in altering the location of the tracks of a street railway located on a State highway, under St. 1898, c. 578, § 16, has authority to order changes in grade as well as in horizontal position.

The commission may also assess upon the railway such portion of the expense of the relocation as it deems proper.

8. — Public Health—Nuisance—Massachusetts Highway Commission . 285

The Massachusetts Highway Commission is not charged with any duties relating to the preservation of the public health, and therefore is not required to take any action toward abating a nuisance upon a State highway when such nuisance does not affect the conditions of the highway as a road structure.

9. — Existing Highway—Abandonment 378

The State Highway Commission has no authority to abandon any portion of an existing State highway, or to surrender such highway to a city or town.

The abandonment contemplated in R. L., c. 47, § 8, may be made only in the case of lands or rights in lands taken by eminent domain, but upon which no State highway has been constructed, or dedicated to public use.

10. — Public Shade Trees—Posting of Notices . . . 385

The Massachusetts Highway Commission has no authority, under existing laws, to affix to public shade trees, located within the limits of a State highway, notices warning the public against the injury or defacement of such trees.

STATE HIGHWAY—Continued.

11. — Liability of Massachusetts Highway Commission for Removal of Poles which are a Menace to Public . . . 396

The Massachusetts Highway Commission, in removing poles which were erected by a telephone company along a State highway, and have become a menace to the public by reason of neglect or decay, after proper notice of that fact, and notice that adequate measures must be taken to insure safety of existing poles or to substitute new ones, has been given to the company, and a reasonable time allowed for proper action by it, would incur no liability to the company.

STATE HOSPITAL—Transportation to, of Pauper with Disease Dangerous to Public Health—Expense . 499
See PAUPER. 19.

STATE HOUSE—Elevators—Local Inspection . . . 300

The elevators in the State House, so long as they are in charge of officers of the Commonwealth designated thereof by the Legislature, are not within the provision of St. 1901, c. 439, that certain construction work and devices therein required shall, in the city of Boston, be approved by the building commissioner.

STATE INSANE HOSPITAL—Trustees of . . . 122
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STATE INSPECTOR AND ASSAYER OF LIQUORS—Certificate—Evidence—State . . . 450
See INTOXICATING LIQUORS. 2.

STATE OFFICERS—Oath of Office—Presidential Electors . . . 246

Since the duty of presidential electors is to the State, their function being to cast the vote of the State in its behalf and as its agents, they are State officers, and must take and subscribe the oaths required thereof by the Constitution.

The provisions of the Constitution of the United States relating to such electors merely establish a method by which the States may exercise their right of voting in proportion to their population.

— When entitled to Opinion of Attorney-General . . . 100
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St. 1900, c. 398, repeals so much of Pub. Sts., c. 13, § 54, as fixes the rate of interest on unpaid taxes due the Commonwealth.	
2. — Specific Remedy for Violation — Quo Warranto — Attorney-General	640
The Attorney-General will not sign an information to restrain a respondent from violating the provisions of a statute, where the Legislature has provided a specific form of remedy for such violations.	
Where such specific form of remedy is provided, it is to be followed to the exclusion of all other forms.	
— Constructive Repeal	210
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STREET RAILWAYS — Transportation of Letter Carriers — Constitutional Law	261
St. 1897, c. 500, § 10, providing that the Boston Elevated Railway Company may establish a five-cent fare, and that such fare shall not be reduced by the Legislature for a period of twenty-five years, constitutes a contract between the Commonwealth and the company. A bill, therefore, requiring all street railways within the Commonwealth to furnish transportation to letter carriers on duty, upon payment to such companies by the United States of a fixed annual allowance, would be unconstitutional, if it reduced fares below five cents, in so far as it related to the Boston Elevated Railway Company, as a law impairing the obligation of contracts.	
2. — Common Carriers of Goods — Constitutional Law	263
Legislation authorizing street railway companies to use their tracks in the public highway as common carriers of goods, wares and merchandise, imposes no new servitude upon the owner of the fee of such highway, and is therefore constitutional.	
— Expense of repairing State Highway, when occupied by Street Railway Tracks	40
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— Alteration of Location on State Highway — Expense	105
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SUPREME COURT—Retired Justice—

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SWAN POND RIVER—Regulations of
Fisheries in—Construction of
Statute 532

St. 1895, c. 203, § 1, authorizing the selectmen
of the town of Dennis to prescribe the times,
places and manner of taking herring or ale-
wives, perch, salmon, eels and trout in Swan
Pond River, and certain tributaries thereof,
does not vest in the selectmen of Dennis any
power to make rules or regulations which are
inconsistent with the general statutes relating
to fisheries, whether or not such statutes were
enacted after the passage of St. 1895, c. 203.

TAX—Upon Boston Elevated Railway
Company, for Use of Locations—
Constitutional Law 426
See BOSTON ELEVATED RAILWAY
COMPANY.

— Legacy Tax 373
See LEGACY TAX ACT.

TAXATION—Real Estate Trust—Valu-
ation of Corporate Franchise—
Deduction of Stock and Bonds . 402

Shares of stock in a real estate trust, so called,
which represent the rights of the beneficiaries
in real estate, under a declaration of trust pro-
viding that no right, title or interest in such
real estate shall vest in the shareholders, are
personal property, and, as such, are not to be
deducted by the Commissioner of Corporations
in ascertaining (under the provisions of R. L.,
c. 14, § 38) the valuation of the corporate fran-
chise of a corporation owning such shares, for
the purpose of taxation.

With the bonds of such trust, however, which
are secured by real estate owned by the trustees,
it is otherwise, and the value of such bonds may
be deducted from the aggregate value of the
shares of the corporation in determining the
taxable value of the franchise.

2. — Foreign Express Company—Inter-
state Commerce 493

St. 1903, c. 437, § 75, imposing an excise tax
upon foreign corporations admitted to transact
business within this Commonwealth under the
provisions of section 58 of such statute, is not
applicable to an express company organized
under the laws of a foreign State and receiving
no goods in Massachusetts for delivery within
the Commonwealth, the business transacted by
such company being interstate commerce, and
as such exempt under the Constitution of the
United States, Article I, § 8, from State regu-
lation and control.

3. — Corporation—Valuation of Corpo-
rate Franchise—Deductions—
Leased Lands 556

Under St. 1903, c. 437, § 72, providing in part
that from the value of the corporate franchise
of a corporation, as ascertained by the Tax Com-

TAXATION—Continued.

missioner for the purposes of taxation, there may be deducted the value of its real estate and machinery within the Commonwealth subject to local taxation, the Tax Commissioner may deduct the value of real estate leased but not owned by such corporation, and the value of buildings thereon erected by it.

4. — Corporations — Valuation of Corporate Franchise — Deductions — Notes Receivable — Machinery and Merchandise — Boats, Wagons and Other Appliances — Deposits in Savings Banks and Certificates of Indebtedness in Voluntary Associations . . . 558

Under the provisions of St. 1903, c. 437, §§ 72, 74, in part relating to deductions from the value as ascertained by the Tax Commissioner of the corporate franchise of a corporation liable thereunder to an excise tax upon such franchise, deposits in savings banks within the Commonwealth and certificates of interest in voluntary associations and trusts, as well as notes receivable, are to be deemed "securities" within the meaning of section 72, and are to be deducted from the value of such corporate franchise.

The phrase "machinery and merchandise," as used in St. 1903, c. 437, §§ 72, 74, includes boats, steamboats, vessels, carts, wagons, horses, furniture and fixtures which are not part of the real estate, owned by a domestic corporation.

5. — Corporation — Tax on Corporate Franchise — Assessment — Appeal — City or Town — Party aggrieved . . . 628

Under R. L., c. 14, § 85, establishing a Board of Appeal from the decision of the Tax Commissioner in the assessment of taxes upon corporate franchises, and providing that "any party aggrieved" by a decision of such commissioner, as therein specified, may, within ten days after notice of his decision, appeal to such Board, a city or town has no such interest in the assessment of the tax in question as to constitute it a "party aggrieved" within the meaning of the statute above cited.

- TEACHER, NORMAL SCHOOL —**
Salary — Special Services . . . 21
See EDUCATION, STATE BOARD OF. 1.

- TEACHERS —** Payment from Massachusetts School Fund . . . 240
See SCHOOL FUND.

- TELEPHONE AND ELECTRIC LIGHT COMPANIES —** Locations for Poles and Wires — "Private Way" — Eminent Domain — Compensation — Constitutional Law . . . 423

Assuming that the term "private way" in a proposed act, entitled "An Act to authorize the granting to telephone and electric light companies locations for poles and wires upon private ways," is used in its technical sense, as refer-

TELEPHONE AND ELECTRIC LIGHT COMPANIES—Continued.

ring to ways laid out under the provisions of R. L., c. 48, § 65, such way is in fact a public way; and the Legislature may authorize the grant of locations for poles and wires upon or along private ways, without provision for compensation for damages occasioned thereby.

If, on the other hand, the term is used as referring to ways or lands held by private individuals, a statute assuming to authorize the location of poles and wires thereon, without provision for the recovery of damages by the owners, is unconstitutional.

- TELEPHONE AND TELEGRAPH POLES —** Removal of, from Land taken by Metropolitan Park Commission . . . 82
See METROPOLITAN PARK COMMISSION. 2.

- THEATRE —** Roof Garden . . . 564
See BUILDING LAWS.

- TIDE WATER —** Authority of Board of Harbor and Land Commissioners to establish Boundary Lines . . . 249

The Board of Harbor and Land Commissioners is not authorized, under St. 1881, c. 196, § 1, to establish boundary lines in tide waters between towns created after the passage of such statute.

2. — Displacement — Assessment for Compensation — Statute of Limitations . . . 502

The statute of limitations does not run against the Commonwealth in the matter of the assessment and collection of the tax imposed under R. L., c. 96, § 23, upon the displacement of tide water.

- Displacement of — Solid Filling . . . 217
See FLATS.

- TOPOGRAPHICAL SURVEY COMMISSION —** Boundary Lines . . . 40

The Topographical Survey Commission have no authority, under Res. 1897, c. 88, to change any portion of the boundary line between Massachusetts and Rhode Island, as fixed by a decree of the Supreme Court of the United States, in compliance with the wishes of certain adjacent inhabitants, who supposed they lived in Rhode Island, but who find upon the marking of the line that they live in Massachusetts.

Quare: Whether Rhode Island, by exercising jurisdiction over a portion of Massachusetts territory since the decree, and in face of the injunction therein, could gain any prescriptive right of jurisdiction over such territory.

- TOWNS —** Public Library — Support . . . 316

A library, situated in a town, to which the inhabitants thereof have free access, and of which they have the use, although it is not

TOWNS—*Continued.*

owned or controlled by the town, is a public library within the meaning of R. L., c. 102, § 163, which provides that money received from the issuance of dog licenses shall be returned to cities and towns to be expended for the support of public libraries or schools.

— Fish Weirs—License . . . 25
See FISH WEIRS.

— Union of Towns to employ Superintendent of Schools—Article in Town Warrant . . . 78
See SCHOOLS. 2.

— Payment of Tuition at Manual Training School . . . 98
See HIGH SCHOOL. 1.

— Lay-out of Street over Commonwealth Land . . . 234
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— Water Supply—Public Rights—Fishing . . . 239
See GREAT PONDS. 3.

— Payment of Tuition of Pupil at High School in Another Town—Length of Course of Study . . . 451
See HIGH SCHOOL. 2.

— Joint Caucuses—Acceptance of Statutes . . . 473
See AUSTRALIAN BALLOT LAW. 3.

TOWN RECORDS—Preservation of . . . 48
See PUBLIC RECORDS. 1.

TRADE MARK—Filing and Recording—Identical Trade Marks . . . 303

It is the duty of the Secretary of the Commonwealth, under St. 1895, c. 462, § 1, to refuse to receive or record a label which has already been recorded, notwithstanding the fact that the class of goods dealt in may be wholly dissimilar to the merchandise specified in the former application.

TRADING STAMP—Definite Article—Exchange . . . 449

A trading stamp company may, under St. 1903, c. 386, issue trading stamps to merchants, for delivery to their customers, upon condition that a certain number of such stamps may be exchanged by the holder thereof for a definite and specified article, on inspection at the store of such company; and the customer, after receiving the article specified, may further exchange it for any other article of equal value exhibited at such store, without violating the provisions of such statute.

TRANSPORTATION—Intoxicating Liquors—Alcohol . . . 621
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TRAVELLING EXPENSES—Clerks of Court—Assistant Clerks—Allowance . . . 592
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TREASURER AND RECEIVER-GENERAL—Investment of Funds controlled by Commonwealth—Notes and Bonds of Counties, Cities and Towns—Net Indebtedness . . . 561
See COMMONWEALTH. 6.

TREE WARDENS—Authority of . . . 191
St. 1899, c. 330, a codification of the laws relative to the preservation of shade trees, which makes it obligatory upon towns to elect a tree warden, supersedes the authority over such trees conferred by earlier statutes upon selectmen or other town officers.

Since chapter 330 defines public shade trees as "all shade trees within the limits of any public way," it has the effect to relieve the Board of Agriculture from the obligation, imposed by St. 1890, c. 186, to supply M spikes to towns for the purpose of designating such shade trees as are to be considered public shade trees.

— Duty as to Public Shade Trees—Authority of Massachusetts Highway Commission . . . 244
See PUBLIC SHADE TREES.

TRUST COMPANY—Loan to Single Individual . . . 190

Under St. 1888, c. 413, § 17, a trust company may not loan to one individual, whether a person, firm or corporation, more than twenty per cent. of the capital stock of the company, even though a portion or the whole of the indebtedness is secured by pledge of marketable collateral.

2. — Place of Business—Branch Office . . . 317
A trust company may legally receive or disburse money at a place other than its main office; and, subject to the provisions of R. L., c. 116, § 35, may purchase and hold real estate for the purpose of maintaining a branch office.

TUITION—Of Pupil attending High School, by Town not maintaining a High School—Length of Course of Study . . . 98
See HIGH SCHOOL. 1.

ULTRA VIRES—Erection of Pier by Private Corporation . . . 193
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UNINCORPORATED ASSOCIATIONS—Foreign—Appointment of Agent for Service of Process . . . 221
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— Manufacture of Gas—Returns to Gas and Electric Light Commissioners . . . 311
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— Authority to appoint Agent of Commonwealth for Collection . . . 598
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— Troops — Use of Rifle Ranges of Volunteer Militia by . . . 439
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UNMARRIED WOMAN — Settlement . . . 17
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VACANCY — Created by Resignation of Member of Congress, how filled . . . 339
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— Clerk of the Superior Court for the County of Suffolk . . . 536
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VETERAN — Soldiers' Aid — Widow or Dependent Relative — Effect of Criminal or Wilful Misconduct . . . 408

The provision in R. L., c. 79, § 18, excepting from the benefits of "soldiers' aid" a person, otherwise eligible, who has become poor and unable to support himself by reason of his own criminal or wilful misconduct, is limited in application to veterans; and, in the case of the widow or other dependent relative of a soldier who was himself entitled to receive such aid, the fact that poverty was the result of insanity, caused by intemperance, is not material.

2. — Soldiers' Aid — Criminal or Wilful Misconduct — Wife or Widow and Dependent Relatives . . . 417

R. L., c. 79, § 18, is not applicable to a soldier who, by reason of his own criminal or wilful misconduct, has become poor and wholly or partially unable to support himself; and, although such soldier may in other respects be eligible under the statute, neither he nor his family are entitled to the aid therein provided.

3. — Bounties — Constitutional Law . . . 584

House Bill, No. 992 entitled "An Act to authorize the payment of money to certain veterans of the civil war," providing in section 1 that the persons therein specified shall receive from the treasury of the Commonwealth the sum of \$125, "as a testimonial of the sense that the Commonwealth entertains of his patriotism and faithful service," in effect requires the payment from the public treasury of a sum of money in the nature of bounty to such veterans of the war of the rebellion as have never received bounties, and cannot in principle be distinguished from St. 1904, c. 458. The proposed act is therefore unconstitutional.

VETERANS PREFERENCE ACT . . . 119, 186
See **CIVIL SERVICE**. 1, 2.

VETERINARY MEDICINE, BOARD OF REGISTRATION IN — Registration — Certificate — Issuance based upon Misrepresentation or Error — Revocation . . . 625

The Board of Registration in Veterinary Medicine may revoke a certificate of registration in veterinary medicine, issued under the provisions of St. 1903, c. 249, § 33 if it clearly appears that such certificate, by reason of misrepresentation or error, was issued in a case where the facts did not warrant such issuance.

VETO — Passage of Bill or Resolve over Veto — Constitutional Law . . . 513
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VOLUNTARY ASSOCIATION, UNINCORPORATED — Returns to Gas and Electric Light Commissioners . . . 8
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WACHUSETT MOUNTAIN STATE RESERVATION — Specific Appropriation — Unexpended Balance . . . 383

The purpose of the appropriation under St. 1901, c. 496, was expressly limited to the acquisition of land and the construction and repair of the roadway on the Wachusett Mountain State reservation, and an unexpended balance remaining therefrom may not be expended for the erection of a house for the use of the superintendent of such reservation.

WARRANT — Fees for Service . . . 20
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— Article in Town — Union of Towns to employ Superintendent of Schools . . . 78
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— For Payment of Money from Treasury of Commonwealth — Delegation by Executive Council of Authority to approve . . . 597
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— Danvers Insane Hospital — Contract with Town of Danvers — New Buildings . . . 463
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— Great Ponds — Rules and Regulations of State Board of Health — Duty of Commissioners on Fisheries and Game to stock with Food Fish . . . 552
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 OF. 2.

WOMEN—Right to participate in Causes 469
See AUSTRALIAN BALLOT LAW. 2.

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